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MASSACHUSETTS REPORTS

172

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

AUGUST 1898—MARCH 1899

GEORGE F. TUCKER
REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.

HON. CHARLES ALLEN:

(Resigned, September 1, 1898.)

HON. OLIVER WENDELL HOLMES.

HON. MARCUS P. KNOWLTON.

HON. JAMES M. MORTON.

HON. JOHN LATHROP.

HON. JAMES M. BARKER.

HON. JOHN W. HAMMOND.

(Appointed, September 7, 1898.)

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WHITNEY ELECTRICAL INSTRUMENT COMPANY *vs.* GEORGE
W. ANDERSON, assignee.

Suffolk. June 23, 1898. — August 30, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

*Instructions — Exceptions — Evidence for the Jury — Agency — Conversion —
Weight of Evidence.*

Where, in an action of tort for the conversion of certain personal property, it is necessary to submit the question at issue to the jury, there being evidence to support the contention of each party, and it is done in a form not objected to and the only exception taken was to certain portions of the charge, which are set forth in the bill of exceptions, and the whole charge is not reported, but it appears that other instructions not excepted to were given, it must be assumed that appropriate instructions were given if the jury should find that the defendant was acting merely as the agent of the plaintiff.

The weight of the evidence is not for this court to determine, nor is the question before it whether there is any evidence for the jury, if this is conceded.

Where a party to an action contends that on the evidence reported certain principles of law are involved, upon which the jury should have been instructed, and these do not appear in the instructions given, but it appears that the party has picked out a single paragraph of the charge to insert in the bill of exceptions, and it does not appear that he asked for any instructions, or, if he did ask for them, that they were not given, he shows no ground of exception, as instructions should have been requested.

TORT, for the alleged conversion by the assignee in insolvency of the estate of W. B. Southgate and Company, composed of W. B. Southgate and H. F. Kellogg, of certain electrical instruments. Writ dated June 6, 1896.

At the trial in the Superior Court, before *Lilley, J.*, there was evidence tending to show that the instruments, which were manufactured and owned by the plaintiff, were shipped by it to Southgate and Company, and to persons to whom Southgate and Company ordered them shipped; that at the time of the insolvency the instruments were in the possession of the insolvents, and came into the possession of the defendant as their assignee; and that there was no express agreement, oral or written, between the plaintiff and Southgate and Company as to the nature of their relations with each other, or as to the title to the instruments shipped, unless such agreement should be found in the following letter, written by the plaintiff to Southgate and Company, and dated August 31, 1895:

"We have perfected our schedule of discounts based on a sliding scale, . . . and we herewith beg to hand you our scale applicable to manufacturers and dealers, also to the consumer. To you, as agents, we quote 10% better than to our discount to dealers through the entire scale. This discount will go into effect the 1st of September, and will be figured on the whole month's business, the instruments being billed to you at list, and discount credited at the end of the month. Of course it is hardly necessary for us to caution you against cutting these prices in any way, as you appreciate the importance of sustaining uniform prices fully as well as ourselves. We believe that a careful consideration of this plan of making discounts will commend it to all, and we believe that a greatly increased business the coming season will result from its adoption. On the attached sheet find the scale of discounts."

There was also evidence tending to show that Southgate and Company were engaged in Boston in the business of buying and selling electrical instruments and supplies of various kinds purchased by them from various manufacturers, and that the plaintiff was engaged in the manufacture of certain kinds of electrical instruments in New Hampshire; that for a long time prior to the insolvency, Southgate and Company had sent orders to the

plaintiff both to ship goods direct to themselves, and to other parties from whom Southgate and Company had taken orders; that upon the books of the plaintiff goods appeared in an account under the head of "Southgate & Co.," and that other accounts with similar headings in the books were testified by the plaintiff to be accounts for goods sold to the parties whose names therein appeared; that all the orders covering the shipments in controversy were on blanks headed "W. B. Southgate & Co., Manufacturers' Agents"; also that the letter heads used by Southgate and Company in their correspondence with the plaintiff were as follows: "W. B. Southgate & Co., Manufacturers' Agents and Dealers in Electrical Specialties & Manufacturers' Supplies"; and also that during the period covered by said shipments Southgate and Company advertised in two electrical weekly papers as selling agents of Whitney Electrical Instruments, which were the instruments manufactured by the plaintiff.

There was further evidence tending to show that an agreement had been made by which Southgate and Company had a certain discount from the list prices, varying according to the amount of goods they should order from the plaintiff.

The insolvents testified that they had had conversation and communication with the plaintiff's officers with reference to their right to sell the plaintiff's goods within a certain specified territory, and that they never had had any conversation or communication with reference to acting as the agents of the plaintiff, except as may be inferred, if at all, from the said conversation.

There was further evidence that the plaintiff was purchasing brass from the insolvents, and that on the books of both plaintiff and insolvents the brass was entered on the opposite side to that on which was the account for electrical instruments, and applied as a set-off *pro tanto*; that there had been no settlement between the parties from the time when these relations began, but that statements had been sent to Southgate and Company by the plaintiff; that shortly before their insolvency, when in business difficulties, the insolvents had a conversation with Whitney, whose exact relations to the corporation did not appear except as shown on the letter head of the plaintiff by which he was described as the "Financial Manager," in which conversation a discussion was had as to the amount of the plaintiff's claim, and

as to whether it would assent to a proposition of composition, but that no claim was made by Whitney that the plaintiff stood in any other relation to the insolvents than that of creditor. Whitney did not appear at the trial, and no witnesses were produced by the defendant to testify as to the agreement or arrangement claimed by the plaintiff to exist between it and the insolvents.

The judge submitted the case to the jury upon the following issue: "Did the plaintiffs retain the title and ownership of the instruments shipped by them to the insolvents, W. B. Southgate and Company?"

Among other instructions, to which no exception was taken, the judge gave the following:

"It must appear to your satisfaction that it was the understanding of both parties, — the Whitney Company and Southgate and Kellogg, — when the arrangements were entered into for the shipping of these goods, that the title should remain in the Whitney Company. In other words, it is all a matter of agreement, — not necessarily an express agreement, not necessarily an agreement reduced to writing, but an agreement upon which the minds of both parties met. For instance, it would not be enough to say, 'We are satisfied that the Whitney Company intended from the first to retain the ownership and title of those goods; we are satisfied of that, and hence will find that they did retain the title and ownership.' That would not be enough. There must have been, not only an intention upon the part of the Whitney Company to retain title in the goods, but there must have been also an intention upon the part of Southgate and Kellogg that they should retain title in the goods. It must appear that there was an agreement, either express or implied, between the Whitney Company and Southgate and Kellogg, by which the title in the goods that the Whitney Company shipped to Southgate and Kellogg, or to persons for whom Southgate and Kellogg obtained orders, should remain in the Whitney Company."

The jury answered the question submitted to them in the negative.

The plaintiff alleged exceptions to the above quoted instructions.

F. A. Wyman & A. A. Wyman, for the plaintiff.

C. A. Reed & G. W. Anderson, for the defendant.

LATHROP, J. The plaintiff states in its brief the contention of each party, and says that there was evidence to support each contention. It was necessary, therefore, to submit the question at issue to the jury. It was done in a form not objected to. The only exception taken was to certain portions of the charge, which are set forth in the bill of exceptions. The whole charge is not reported, but it appears that other instructions not excepted to were given. We must assume, therefore, that appropriate instructions were given, if the jury should find that Southgate and Company were acting merely as the agents of the plaintiff. See *Lambeth Rope Co. v. Brigham*, 170 Mass. 518.

The plaintiff's brief is chiefly devoted to arguments on the weight to be given certain portions of the evidence which make in its favor; but the weight of the evidence is not for us to determine. Nor is the question before us whether there was any evidence for the jury, for this is conceded.

The plaintiff also contends that on the evidence reported certain principles of law are involved, upon which the jury should have been instructed, and that these do not appear in the instructions given. But the plaintiff has picked out a single paragraph of the charge to insert in the bill of exceptions, and it does not appear that he asked for any instructions, or, if he did ask for them, that they were not given. Instructions should have been requested. See *Texas & Pacific Railway v. Volk*, 151 U. S. 73, 78, and cases cited. *Exceptions overruled.*

MAYOR AND ALDERMEN OF NEWTON, petitioner.

Middlesex. December 15, 1897 — August 31, 1898.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Abolition of Highway and Railroad Crossings at Grade — Exceptions to
Auditor's Report — "Actual Cost of Alterations" — Statute.*

The objection, that the Commonwealth filed no exceptions, but only objections, to the report of an auditor appointed under St. 1890, c. 428, § 7, upon the allow-

ance of expenses incurred in the abolition of a grade crossing, if not taken in the Superior Court, is not open in this court upon a report of the case.

As part of the "total actual cost of the alterations" prescribed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway in a city by a railroad, the cost of a new station there cannot be allowed, but only what the expense of altering the old station and lowering it to meet the tracks and providing suitable approaches would have been; nor the cost of a ninety-five pound rail to replace a seventy-two pound rail in use before the alterations, but only the expense of a new seventy-two pound rail as laid, less the value of the old rails; nor an amount as an investment return for the use of the railroad in removing material and for interference with its other traffic.

PETITION, under St. 1890, c. 428, as amended, by the mayor and aldermen of Newton, for the abolition of certain grade crossings in that city. Hearing in the Superior Court, before *Richardson, J.*, who reported the case for the determination of this court. The facts appear in the opinion.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices except *Holmes, J.*

W. S. Slocum, for the petitioner.

F. T. Hammond, Assistant Attorney General, for the Commonwealth.

S. Hoar, (*W. Hudson* with him,) for the Boston and Albany Railroad Company.

MORTON, J. This was a petition by the mayor and aldermen of Newton, under St. 1890, c. 428, and acts in addition and amendments thereto, for the abolition of certain grade crossings in the city of Newton. Commissioners were duly appointed by the Superior Court, as provided by § 1 of the act, and made a report specifying the alterations to be made, which was confirmed by the court, and the city and the railroad company proceeded to make the alterations as directed. Subsequently an auditor was appointed pursuant to § 7, to whom were submitted accounts of expenses alleged by the railroad company to have been incurred by it in making the alterations. The auditor made a report, which the railroad company moved to confirm, and to which the city filed objections and exceptions, and the Commonwealth filed objections. The case came on for hearing, and thereupon the questions arising were, at the request of all parties, reserved and reported for the determination of this court.

The railroad corporation objects that the Commonwealth filed no exceptions in the Superior Court. But the point does not seem to have been taken there, and comes too late when taken in this court for the first time. We assume that the rules in regard to equity practice apply to this case.

The questions presented relate to the cost of the new station, to what was paid for new rails, and to what was allowed to the railroad corporation as an investment return, and for interference with its other traffic. The railroad corporation contends that these items constitute a part "of the total actual cost of the alterations," within the meaning of the statute.

One question is, What do alterations include? And the answer depends on the construction to be given to the statute. In construing the statute regard is to be had "to the nature of the subject matter, the various interests, public and private, which are to be affected." *Boston & Albany Railroad v. County Commissioners*, 116 Mass. 73, 76. The object of the statute is to promote the safety of travellers and property on highways, and of passengers and property on railroads, and to remove the obstructions to highways and railroads which are caused by grade crossings. It seeks to do this by abolishing grade crossings. It is just and reasonable that a part of the expense of doing this should be borne by the Commonwealth and by the cities and towns, and the statute so provides. But for obvious reasons it is the policy of the State that much the larger part of the expense should be borne by the railroads, and this policy is expressed in the statute.

The statute applies to existing conditions, and contemplates the abolition of grade crossings by means of changes and alterations in existing conditions. Except so far as is necessary to accomplish the proposed abolition, the existing conditions are, for aught that appears, to continue substantially as before. If the proposed abolition cannot be accomplished except by discontinuing an existing way and building a new way, or by relocating the railroad, that may be done. But this does not alter the fact that the statute contemplates a continuance of existing conditions, subject to such changes in them as may be required to accomplish the abolition of crossings at grade. This does not prevent the railroad company, or a city or town, from making at its own expense any improvements which it may deem advisable in

view of the changes which have been or may be ordered; but we think that it confines the expense which is to be apportioned to that which is incurred in making the alterations which are expressly directed, and to that which is rendered necessary to adapt existing structures and arrangements to such alterations. Such last named expense must be considered as incident to and as a part of that contemplated by the alterations which are ordered. It is manifest, we think, that it could not have been intended that a city or town, or a railroad company, could make such improvements as it chose in connection with or as a part of the alterations required, and insist that the expense of carrying them out should be reckoned as a part of the actual cost of the alterations. In ascertaining the cost, allowance is not to be made for the greater value over the old of the new work and new material and new appliances which replace old work and old material and old appliances, and which in addition to being new may perhaps be better of their kind, or for the fact that the construction may be superior in other respects to what it was before. These are incidental matters which cannot be taken into account in arriving at the actual cost. *Norwood v. New York & New England Railroad*, 161 Mass. 259, 267. Neither do we think that the statute should be construed so strictly as to limit the actual cost to expenditures made in literal compliance with the directions of the commissioners, and to exclude all others. "The total actual cost of the alterations" well may be held to include, not only expenditures made directly upon the alterations themselves, but also those which are rendered necessary to restore existing buildings and structures relatively to their former condition, and to replace in a proper and workmanlike manner the rails, ties, platforms, and other things which have been removed or damaged in the work of alteration. See *Chase v. Worcester*, 108 Mass. 60.

Applying the principles thus laid down to the case before us, we think that the auditor erred in allowing the cost of the new station, and that the sum allowed should have been the expense of altering the old station and lowering it to meet the tracks, and providing suitable approaches, which the auditor finds would have been \$11,000.

We think that there was also error in allowing the cost of a ninety-five pound rail to replace the seventy-two pound one

which was in use before the alterations. It seems to be conceded that the old rails are to be accounted for, and the most which we think that the railroad company can justly claim is the expense of a new seventy-two pound rail as laid, from which should be deducted the value of the old rails.

The questions which we have been considering, and those which we are about to consider, did not arise in *Westborough, petitioner*, 169 Mass. 495, and that case has therefore no bearing upon this. The remaining item relates to the amount allowed to the railroad corporation as a return upon its road as an investment for its use outside the commissioners' lines and for interference with its other traffic. The alteration consisted, amongst other things, in depressing the tracks, and this required the removal of large quantities of material. There was no place inside the commissioners' lines where this could be dumped, and the railroad company procured the most available locations, as the auditor finds, and for convenience and expedition in doing the work, established two dumping grounds, — one east and one west of the commissioners' lines. These were at the busiest points on the railroad corporation's road, and caused interference with its other traffic. We understand from the auditor's report that the railroad corporation "has been allowed in former auditings for the actual expense of doing the work, viz. for the use of locomotives and cars, fuel, repairs, etc., and the payroll of all men employed," and that the sum allowed by the auditor represents "a reasonable advance upon the actual cost," so as to give the railroad corporation a proper return upon the portion of its road thus used, and compensation for the interference with its other traffic. Some emphasis appears to be laid in the auditor's report, and also in the brief of counsel for the railroad, on the fact that the material was transported to points outside the commissioners' lines. We do not see the materiality of that fact. The railroad corporation was entitled to the actual expense of removing such material as the alteration rendered it necessary to remove, whether the points to which it was necessary to remove it were within or without the commissioners' lines. And if the railroad corporation is entitled to an investment return upon the portion of its road outside the commissioners' lines that was used in transporting the material, we do not see why it is not

view of the changes which have been or may be ordered; but we think that it confines the expense which is to be apportioned to that which is incurred in making the alterations which are expressly directed, and to that which is rendered necessary to adapt existing structures and arrangements to such alterations. Such last named expense must be considered as incident to and as a part of that contemplated by the alterations which are ordered. It is manifest, we think, that it could not have been intended that a city or town, or a railroad company, could make such improvements as it chose in connection with or as a part of the alterations required, and insist that the expense of carrying them out should be reckoned as a part of the actual cost of the alterations. In ascertaining the cost, allowance is not to be made for the greater value over the old of the new work and new material and new appliances which replace old work and old material and old appliances, and which in addition to being new may perhaps be better of their kind, or for the fact that the construction may be superior in other respects to what it was before. These are incidental matters which cannot be taken into account in arriving at the actual cost. *Norwood v. New York & New England Railroad*, 161 Mass. 259, 267. Neither do we think that the statute should be construed so strictly as to limit the actual cost to expenditures made in literal compliance with the directions of the commissioners, and to exclude all others. "The total actual cost of the alterations" well may be held to include, not only expenditures made directly upon the alterations themselves, but also those which are rendered necessary to restore existing buildings and structures relatively to their former condition, and to replace in a proper and workmanlike manner the rails, ties, platforms, and other things which have been removed or damaged in the work of alteration. See *Chase v. Worcester*, 108 Mass. 60.

Applying the principles thus laid down to the case before us, we think that the auditor erred in allowing the cost of the new station, and that the sum allowed should have been the cost of altering the old station and lowering it to meet the new grade and providing suitable approaches, which the auditor has allowed to have been \$11,000.

We think that there was also a balance of ninety-five pound rail

which was in use before the alterations. It seems to be conceded that the old rails are to be accounted for, and the ~~more~~ which we think that the railroad company can justly claim is the expense of a new seventy-two pound rail as laid, from which should be deducted the value of the old rails.

The questions which we have been considering, and ~~those~~ which we are about to consider, did not arise in *Westborough petitioner*, 169 Mass. 495, and that case has therefore no bearing upon this. The remaining item relates to the amount allowed to the railroad corporation as a return upon its road as an investment for its use outside the commissioners' lines and for interference with its other traffic. The alteration consisted, among other things, in depressing the tracks, and this required the removal of large quantities of material. There was no place near the commissioners' lines where this could be dumped, and the railroad company procured the most available locations, as the auditor finds, and for convenience and expedition in the work, established two dumping grounds, — one east and one west of the commissioners' lines. These were at points on the railroad corporation's road, and caused interference with its other traffic. We understand from the report that the railroad corporation "has been, in former auditings for the actual expense of doing: the use of locomotives and cars, fuel, repairs, and the roll of all men employed," and that the auditor represents "a reasonable allowance" so as to give the railroad corporation a fair proportion of its road thus used, and caused interference with its other traffic. Some of the items mentioned in the auditor's report, and allowed to the railroad, on the fact that the road was used outside the commissioners' lines, are not the result of that fact. The railroad corporation is to be allowed the expense of the necessary work, and the necessary expense to the railroad corporation. And if the railroad corporation is to be allowed the expense of the necessary work, and the necessary expense to the railroad corporation, it is to be allowed the expense of the necessary work, and the necessary expense to the railroad corporation.

BARTON, LATHROP,

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entitled to a like return upon that portion which was within the commissioners' lines, and also upon the capital invested in locomotives, cars, etc. But we think that by the words "actual cost" it was intended to exclude anything in the nature of a profit, or return upon the investment. "Actual cost" means real cost as distinguished amongst other things from estimated cost, (*Lanesborough v. County Commissioners*, 6 Met. 329,) or from market price, which may include matters that do not enter into the real cost. *Alfonso v. United States*, 2 Story C. C. 421. *United States v. Twenty-six Cases of Rubber Boots*, 1 Cliff. 580. The word "cost" is of limited significance, — much narrower than "damages," for instance, which in the case of laying out one railroad over and across another has been held not to include compensation for the interruption and inconvenience to the business of the latter occasioned thereby. *Massachusetts Central Railroad v. Boston, Clinton, & Fitchburg Railroad*, 121 Mass. 124. In *Lexington & West Cambridge Railroad v. Fitchburg Railroad*, 9 Gray, 226, the "actual cost" of running trains was held not to include interest on cars, and to mean money actually paid out. And in *Alfonso v. United States*, under the revenue act of 1799, c. 128, § 66, it has been held that the words "actual cost" meant the actual price paid in a *bona fide* purchase, and not the market value, thus excluding any idea of profit or return. See also *United States v. Sixteen Packages of Goods*, 2 Mason, 48; *United States v. Tappan*, 11 Wheat. 419, 423.

The object of the provision which we are considering was, it seems to us, in view of the relations of the parties to the work and to each other, to exclude in the accounting between them any profit, and everything except what fairly might be reckoned as a part of the real cost of the alterations; and it appears like a contradiction of terms to speak of an advance upon the actual cost as constituting a part of that cost. Not much light, if any, can be got from the cases in regard to the compensation to be paid by one railroad to another for drawing its passengers, merchandise, and cars over the railroad of the other, and for providing depot accommodations, and for the use of its tracks. See *Boston & Worcester Railroad v. Western Railroad*, 14 Gray, 253; *Metropolitan Railroad v. Quincy Railroad*, 12 Allen, 262; *Metropolitan Railroad v. Highland Street Railway*, 118 Mass. 290;

Cambridge Railroad v. Charles River Street Railway, 139 Mass. 454. Compensation is a term of larger scope than cost, and especially than actual cost. In one instance the statute uses the phrase "reasonable compensation." St. 1845, c. 191, § 2. *Boston & Worcester Railroad v. Western Railroad*, *ubi supra*. It is doubtful if that adds anything, since, from the nature of the case, the compensation must be reasonable. In fixing the compensation in the cases referred to, a suitable return upon the capital invested was included. But in the present case the accounting is expressly limited by statute to "the total actual cost," and unless compensation is held to mean the same as "actual cost" (which we doubt), those cases throw no light on this. The contention of the railroad corporation is, in effect, that a suitable return on the capital invested constitutes a part of the actual cost of the alterations. But, though in a sense the return on capital which one would have received for work done may be said to be a part of the cost, we do not think that in ordinary usage the term "real cost," or "actual cost," includes a return upon the capital invested. After allowing all the actual expenses of doing the work, that seems to us more in the nature of profit than of cost.

The result is, that a majority of the court think that on the first item the sum of \$11,000 should be allowed, on the next item a sum equal to the cost of a new seventy-two pound rail as laid, less the value of the old rails, and the third item disallowed altogether.

So ordered.

MARGARET MAY vs. WILLIAM WOOD & another.

Suffolk. March 10, 1898. — August 31, 1898.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Action founded on False and Malicious Statements inducing a Master to
discharge his Servant — Pleading.*

Whatever may be the form of declaration for inducing masters to discharge their servants, by threats, intimidation, or force, when the cause of action is alleged to be that the defendant by false and malicious statements induced a master to

discharge his servant, it is essential that the statements made should be substantially set out in the declaration, so that the court may see whether any such effect as is alleged could reasonably be attributed to the statements, and that the defendant may know what he is called upon to meet. It is not necessary that the statements of themselves should be defamatory. HOLMES, KNOWLTON, & MORTON, JJ. dissenting.

TORT, to recover damages from the defendants for conspiring together to induce Mary A. Wood to break a certain contract which she had with the plaintiff.

In the Superior Court William Wood demurred to the declaration, on the ground that it did not "set out the words or the substance of the words of the false and malicious statements which said William Wood is alleged to have conspired to make." The demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court. The material portions of the demurrer appear in the opinion.

The case was argued at the bar in March, 1898, and afterwards was submitted on briefs to all the justices.

F. P. Curran, for the plaintiff.

R. Cushman, (*H. N. Glover, Jr.* with him,) for William Wood.

FIELD, C. J. The declaration, after setting forth the agreement between the plaintiff and Mary A. Wood, which is alleged to have been "that the plaintiff should continue to reside as before with the said Mary A. Wood, and to receive \$4.00 as weekly compensation, and the said Mary A. Wood agreed to provide by will a legacy of \$700, to be paid to the plaintiff upon the death of said Mary A. Wood," then alleges "that the defendants, for the purpose of depriving the plaintiff of the benefit of said agreement, and of the legacy provided for her by a codicil to the will of said Mary A. Wood, conspired together to influence and induce the said Mary A. Wood, by divers false and malicious statements, and by inducing said Mary A. Wood to believe that the plaintiff was a dangerous person and unfit associate, to break off her agreement with the plaintiff and discharge her from her employment; and the plaintiff says that by reason of the conduct of the defendants, as aforesaid, the said Mary A. Wood was induced to break, and did break, her agreement with the plaintiff, and has discharged her from her employment, and has revoked the provision made by said Mary A. Wood in her will, for the benefit of the plaintiff."

The allegation of the conspiracy is immaterial, and, taken alone, does not show a cause of action. In *Randall v. Hazelton*, 12 Allen, 412, 414, it is said in the opinion: "The averment of conspiracy in the first count of the declaration cannot change the nature of the action, or add anything to its legal force and effect. The gist of the action is the tort committed and the damage resulting therefrom. To charge both defendants, it is necessary to prove a combination or joint action on their part, and the allegation of a conspiracy may be a proper mode of alleging such joint action; but for any other purpose it is wholly immaterial. If the action cannot be sustained against one of the defendants, then it must fail, although another person is included and a conspiracy alleged. *Parker v. Huntington*, 2 Gray, 125. *Hutchins v. Hutchins*, 7 Hill, 104." See also *Wellington v. Small*, 3 Cush. 145; *Bowen v. Matheson*, 14 Allen, 499; *O'Callaghan v. Cronan*, 121 Mass. 114; *Severinghaus v. Beckman*, 9 Ind. App. 388; *McHenry v. Sneer*, 56 Iowa, 649; *Kimball v. Harman*, 84 Md. 407; *Huttley v. Simmons*, [1898] 1 Q. B. 181.

Disregarding, then, the allegations of a conspiracy, and without considering whether it can properly be alleged that the two defendants jointly induced Mary A. Wood by divers false and malicious statements to discharge the plaintiff, a majority of the court are of opinion that, if the declaration had alleged that the defendants made the false and malicious statements with the intent alleged, and that these had caused the discharge of the plaintiff, the declaration would have described a well known form of action, but that it still would have been necessary to set out the false and malicious statements, either according to their tenor or according to their substance and effect. *Odgers, Libel & Slander*, (3d ed.) 342 *et seq.* *Newell, Slander & Libel*, 857 *et seq.* *Payne v. Beaumorris*, 1 Lev. 248. *Rumsey v. Webb*, Car. & M. 104. *Hartley v. Herring*, 8 T. R. 130. *Derry v. Handley*, 16 L. T. 263. *Corcoran v. Corcoran*, 7 Ir. C. L. R. 272. *Lynch v. Knight*, 9 H. L. Cas. 577. *Hutchins v. Hutchins*, 7 Hill, (N. Y.) 104. *Pollard v. Lyon*, 91 U. S. 225, 237. *Lee v. Kane*, 6 Gray, 495. *Beals v. Thompson*, 149 Mass. 405. *Elmer v. Fessenden*, 151 Mass. 359. *Morasse v. Brochu*, 151 Mass. 567. *Rice v. Albee*, 164 Mass. 88. In the opinion of a majority of the

court there is no occasion to consider the form of declaration in actions for enticing servants away from masters, such as *Walker v. Cronin*, 107 Mass. 555. There is, so far as we are aware, no form of declaration for enticing masters away from servants. Whatever may be the form of declaration for inducing masters to discharge their servants, by threats, intimidation, or force, we are of opinion that when the cause of action is alleged to be that the defendants by false and malicious statements induced a master to discharge his servant, it is essential that the statements made should be substantially set out in the declaration, in order that the court may see whether any such effect as is alleged can reasonably be attributed to the statements, and that the defendants may know what they are called upon to meet. It is not necessary that the statements of themselves should be defamatory. *Morassee v. Brochu*, *ubi supra*.

Demurrer sustained, and judgment affirmed.

HOLMES, J. I cannot agree with the decision of the majority, and as the law in cases of this sort is somewhat unsettled, I think it may be useful that I should state my views. I regard it as settled in this Commonwealth, and as rightly settled, whether it be consistent with some dicta in *Allen v. Flood*, [1898] A. C. 1, or not, that an action will lie for depriving a man of custom, that is, of possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted simply from malevolence and without some justifiable cause, such as competition in trade. *Walker v. Cronin*, 107 Mass. 555, 566. *Morassee v. Brochu*, 151 Mass. 567. *Hartnett v. Plumbers' Supply Association*, 169 Mass. 229, 235. *Delz v. Winfree*, 80 Tex. 400, 405. See *Vegelahn v. Guntner*, 167 Mass. 92, 99, 105. I think that it does not matter what motive to abstain from dealing is given to the possible customer, whether it be fear or simply prejudice, if the motive be effectual, or whether it be produced by falsehood, or without it by malevolently intended advice. I think it plain that the fact that the conduct of the possible customer in abstaining from dealing is lawful does not affect the liability of the person who induced him to do so, although this person is remoter from the damage complained of. I think this a principle which not only

is obviously sound, but is established by the cases first cited above, by the recognition of loss of custom as an element in damages, (*Walker v. Cronin*, 107 Mass. 555, 565; and *Odgers, Libel & Slander*, (2d ed.) 298, 307, 309,) and by the doctrine that a man who utters a slander may be liable for the privileged repetition of it, if reasonably to be expected, when he would not be liable unless he actually intended it, if the repetition were itself a wrong. *Elmer v. Fessenden*, 151 Mass. 359, 362, 363. See also *Hayes v. Hyde Park*, 153 Mass. 514; *Delz v. Winfree*, 80 Tex. 400, 404.

A fortiori, under similar conditions and limitations, an action will lie for inducing the breach of an actual contract. *Walker v. Cronin*, 107 Mass. 555. *Tasker v. Stanley*, 153 Mass. 148. As in the former case, the ground of liability is not false statements, but the intentional causing of temporal damage, without justifiable cause, by any means contemplated as effectual, and proving so in the event. One of the means alleged in the present declaration, namely, inducing Mary A. Wood to believe that the plaintiff was a dangerous person and unfit associate, might have been accomplished without uttering a falsehood, and might have been alleged as the only means without impairing the count.

I cannot make it plainer than it is upon simply reading the declaration that this is an action of the kind just supposed. It is not an action for slander with special damages, but it is an action for malevolently and without justifiable cause inducing a third person to break a contract. That is the gist of the action, and falsehood or slander is material only as one out of many possible and two alleged means of bringing about the wrong. It is one degree more remote than where the slander itself is the thing complained of, and by all analogy when referred to need not be set out specifically as when slander is the gist. See the form of declaration held good on demurrer in *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333, 338, 339; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48. Compare *Capron v. Anness*, 136 Mass. 271; Y. B. 43 Ed. III. 11, pl. 1, *Finchden, ad finem*; *Middlefield v. Church Mills Knitting Co.* 160 Mass. 267, 271; *Bernard v. Cafferty*, 11 Gray, 10.

Of *Rice v. Albee*, 164 Mass. 88, I will only say that, whether the decision be right or wrong, the reasoning always has seemed to me inadequate, but that, however that may be, in that case the action was for preventing the making of a contract, not for causing the breach of one already made. I do not understand that it was intended to overrule previous decisions, or to dissent from cases like *Lumley v. Gye*, 2 El. & Bl. 216, which previously had been approved by the court.

I deal only with the ground which I understand to be relied on in the judgment of the court. I suppose that nothing else is open on the special demurrer, (*Parker v. Huntington*, 2 Gray, 124, 126, 128,) but I will add that the declaration, although informal, plainly means that the defendants not only conspired to do, but did, the acts by reason of which, as it is alleged, Wood was induced to break her contract with the plaintiff. If the defendants wanted a more formal allegation, they should have specified the defect in their demurrer. *Windram v. French*, 151 Mass. 547.

Mr. Justice KNOWLTON and Mr. Justice MORTON authorize me to say that they agree with the foregoing.



MEMORANDUM.

ON the first day of September, 1898, the Honorable CHARLES ALLEN resigned the office of justice of this court, which he had held since the twenty-third day of January, 1882.

ON the seventh day of September, 1898, the Honorable JOHN WILKES HAMMOND, one of the justices of the Superior Court, was appointed a justice of this court, in place of Mr. Justice ALLEN, resigned, and took his seat upon the bench on the thirteenth day of the same month, at the sitting of the court then held at Pittsfield, in the county of Berkshire.

CHARLES S. KEENE vs. LEMUEL E. DEMELMAN.

Suffolk. December 6, 1897. — September 14, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Contract — Warranty — Mistake — Rescission — Equity.

If a contract for the sale of land, containing a warranty of the number of square feet of the land, is based upon an honest mistake on the seller's part as to the number of feet, which mistake is induced by the false, although not fraudulent, representation of a broker, who was either the buyer's agent in the transaction, or a person who had entered into a contract with the seller and then had assigned his rights thereunder to the buyer, a court of equity has the power to permit the seller to rescind the contract on the ground of mistake, if the other party will not accept performance of the contract, omitting the particular stipulation inserted through the mistake.

BILL IN EQUITY, filed May 4, 1896, in the Superior Court, to restrain the prosecution of an action at law. At the hearing a decree was entered for the plaintiff; and the defendant appealed to this court. The facts appear in the opinion.

H. P. Harriman & W. N. Buffum, for the defendant.

W. H. Coolidge, (*G. S. Selfridge* with him,) for the plaintiff.

FIELD, C. J. The plaintiff owned a lot of land on which was an apartment house called the "Hotel Puritan," numbered 37 and 39 Burgess Street, Boston. The building covered the larger part of the lot, and the boundaries of the lot, as we infer, were pretty well defined. One Haines, then a member of the firm of Charles W. Cummings and Company, real estate brokers, in May, 1894, telephoned to the plaintiff, asking if he was the owner of Hotel Puritan, and the plaintiff answered yes. Haines then asked if it was still for sale, and the plaintiff answered yes. Haines then said that he thought he had a client who wanted such a piece of property, and asked the price, and the plaintiff gave the price as \$15,500. Haines sent one Taylor, one of the firm's clerks, to the City Hall to examine the assessors' books, and he reported that the lot contained 11,916 square feet. This was a mistake, and it occurred in this way. On the assessors' books the plaintiff was assessed "for Nos. 37 and 39 Burgess Street, Ward 20, Boston, 5,958 feet of land, \$3,300; house, Puritan, \$10,000,"

total, \$13,300. The clerk inferred that there were two lots, each containing 5,958 square feet, and he doubled this, making 11,916 square feet. Haines thereupon, on May 7, 1894, prepared a writing, which was signed by the plaintiff and sealed, wherein the plaintiff agreed with Cummings and Company to hold the property until May 12, 1894, at noon, during which time he agreed to transfer it to Cummings and Company, or to such persons as they might designate, by insured title, for \$7,500, to be paid at the time of sale subject to a mortgage for \$8,000 then on the property. The property was described as "embracing land numbering 35 and 37 Burgess Street, Dorchester Dist., containing in all 11,918 ft. of land, and also double apartment house on same, known as Hotel Puritan, renting for \$1,716 per year." The plaintiff testified that before he signed the writing he noticed the clause stating the number of feet, and asked Haines where he got that information, and Haines said, "At City Hall"; that he (the plaintiff) then said that this was the first time he knew of the number of feet. The property was managed for the plaintiff by an agent, and the plaintiff personally had little to do with it.

Cummings and Company called the defendant's attention to various pieces of property which they had for sale, and among them was this property of the plaintiff, and the defendant, after some negotiations, said that if they would get an option from the plaintiff at the price of \$14,500, he would look over the property. On May 28, 1894, the first option having expired, Cummings and Company procured a second option from Keene, wherein he agreed to hold the property until June 2, at noon, during which time he agreed to sell it to them, or to such person as they might designate, for \$6,500, to be paid at the time of sale, subject to a mortgage of \$8,000. The property was described as follows: "Lots numbering 37 and 39 Burgess Street, containing 11,916 feet of land, and a double apartment house, land being assessed for \$3,300, and house for \$10,000." In this description the numbers are right, the mistake of the first option in this respect having been corrected. This option contained statements of the amount of the rents and stipulations concerning an apportionment of the taxes for 1894-95, and for paying the expenses of transfer; and it was shown to the defendant, who went out with

Haines and examined the property. Haines testified that the defendant "went all around the outside of the land first, and then examined the basement and first floor of No. 37, and the basement of No. 39." The defendant agreed with Cummings and Company to take the property, and on May 31, 1894, for the consideration of one hundred dollars, they indorsed on the option of May 28, 1894, a transfer of it to the defendant, or to any one he should name; "balance to be paid, excepting mortgage for \$8,000, is \$6,400, on or before June 4, 1894." On the 31st of May, or on June 1, the plaintiff was informed by Haines that he had sold the property, and Haines and the plaintiff went to the defendant's office, and the defendant showed the plaintiff a type written receipt which the plaintiff read and signed. The plaintiff testified that he then told the defendant that the quantity of land was not mentioned in his deed, and that until Haines told him he never knew the contents of the lot. The receipt is as follows:

"Boston, May 31, 1894.

"Received of L. E. Demelman, of Boston, Mass., receipt whereof is hereby acknowledged, \$100, being part payment of houses 37 and 39 Burgess Street, Dorchester, warranted to contain 11,916 feet of land. Terms as follows: \$8,000.00 to remain on mortgage, and balance, \$6,400.00, to be paid upon transfer of title to be guaranteed by the Mass. Title Insurance Co.

"And I further agree to pay proportion of accruing taxes for 1894-5, also to pay all expenses of transfer except registering of deed.

"Witness my hand and seal this year and date above written.

"It is further agreed that papers pass on or before June 4th next.

Charles S. Keene. [Seal.]

"Witnessed by A. J. Haines."

The defendant paid the plaintiff \$100 by check, and requested that the deed be made to Rachel A. Schwarzenberg.

The parties met on June 4, at the office of the Massachusetts Title Insurance Company, and the plaintiff tendered a deed signed by himself and his wife, in which the property was properly described, but it did not contain any statement of the number of feet of land. The defendant objected to it on this ground. The insurance company said that it could not give a policy assur-

ing the number of feet without a survey, and a survey was ultimately agreed upon, and it was found that the whole lot contained 5,888 square feet. The plaintiff offered to "call the trade off" on the ground of a mistake, and to pay back the \$100, or to deliver the deed which had been tendered. The defendant refused to call the trade off or to accept the deed, but he was ready to pay the \$6,400 called for by the receipt if he could receive a deed with a warranty that the land contained 11,916 square feet. A few hours afterwards the defendant brought an action at law against the plaintiff for a breach of the agreement contained in the receipt, and attached his property.

The present bill in equity avers, among other things, as follows: "At the trial of the said cause at common law in the Superior Court, Suffolk County, the justice thereof continued said cause in order that the defendant in said action, to wit, the said Keene, might bring this his bill of complaint, to restrain the further prosecution of said action at common law, inasmuch as, in the opinion of the said justice, the said Keene could not in an action at common law obtain the equitable relief that he could obtain by bringing this bill in equity." This is not denied in the answer. The Superior Court entered a decree in the present suit, which enjoined the defendant from prosecuting the action at law, or any other action for the same cause of action, and ordered the plaintiff to pay back to the defendant the \$100, and from this decree the defendant appealed. The evidence was taken before a commission appointed under Chancery Rule XXXV. of the Superior Court, and was brought before us, but there are no findings of fact by the Superior Court.

We think that the Superior Court properly could have found on the evidence that Cummings and Company were not the agents of the plaintiff, but that they acted either independently for themselves, or as the agents of the defendant in procuring the second option. They transferred their rights under that option to the defendant. Such an option is not absolutely inconsistent with Cummings and Company's acting as the agent of the plaintiff; but on the face of the paper itself the parties appear to be acting, the one as a possible vendor and the other as a possible vendee. See *Bassett v. Rogers*, 162 Mass. 47; *S. C.* 165 Mass. 377. That court also could have found that the clause in the option and the

warranty in the receipt concerning the number of feet were inserted in consequence of information furnished by Haines; that otherwise the plaintiff knew nothing about the number of feet, and that the defendant knew that the plaintiff had no knowledge on the subject except from the statement made by Haines. If it be assumed that both the plaintiff and the defendant were equally honest, and relied upon the assurances given by Haines, and that Haines was honest, and relied on the statement made by the clerk from an examination of the assessors' books, and that the clerk was honest and the mistake he made was one which, as counsel have agreed, any one might have made from the form of the entry in the assessors' books, the result would be that the defendant, the plaintiff, and Haines, as representing Cummings and Company in their dealings with one another, acted under a common mistake of fact, and that the plaintiff's statement concerning the number of feet of land in the last option, and the warranty in the receipt, were induced by the representations of Haines, which were false, but not fraudulent.

The rights of Cummings and Company in the option were transferred to the defendant, and the defendant as assignee thereof took only the rights of Cummings and Company. The subsequent receipt was given by the plaintiff directly to the defendant, but the court could properly have found that this receipt was given in pursuance of the option, and in consequence of the assignment of it to the defendant.

The most serious difficulty is that the receipt contains an express warranty of the number of feet. It is argued that it is common knowledge that a warrantor is bound by his warranty, if it turns out to be false, although he believed the warranty to be true at the time he gave it, and that it is immaterial that this belief was induced by the representations of the other party to the warranty, provided there has been no fraud. It seems that the shape of the lot was such that the area could not be readily estimated from a view, and we think that the Superior Court could properly have found on the evidence that neither the plaintiff nor the defendant was wanting in due care in relying upon the representations of Haines regarding the number of feet in the lot. There was no mistake on the part of any of the

parties concerning the identity of the house and land purchased and sold, but the difference in the number of square feet which the land was represented or warranted to contain and that which it did in fact contain cannot, we think, be regarded as immaterial. If the receipt had followed the language of the second option, and had only described the land as "containing 11,916 square feet," this might have been held to be an implied warranty, or a representation equivalent to a warranty. It may well be that the defendant should not have been compelled to accept the deed tendered. *Roberts v. French*, 153 Mass. 60. It does not, however, necessarily follow that he can hold the plaintiff to his warranty of the contents of the land. This is a warranty in connection with an agreement for a sale, and is a part of the agreement. There seems to have been no previous discussion about a warranty, and no oral agreement to give one. The word was first introduced by the defendant in the receipt. The plaintiff noticed it, but there was no evidence that the effect of it was considered by the plaintiff.

If the defendant had been permitted to prosecute his action at law, it is questionable what the measure of damages would have been. In some jurisdictions, the damages would be held on the evidence appearing in this case to be only the consideration which the defendant had paid with interest. *Baltimore Permanent Building & Land Society v. Smith*, 54 Md. 187. *Hammond v. Hannin*, 21 Mich. 374. See *Engell v. Fitch*, L. R. 4 Q. B. 659. The Superior Court proceeded on the ground that in this Commonwealth the damages in the action at law might be something more than the consideration paid, and that in equity the plaintiff had the right to rescind the contract if the defendant would not accept a deed of the premises as they were, on the ground of an honest mistake induced by the representation of the defendant's agent or assignor. The warranty being in an executory contract of sale, it is but a stipulation as a part of the contract. *Wiley v. Athol*, 150 Mass. 426, 434. The defendant was not bound to accept the deed tendered, because it did not convey land containing the requisite number of square feet, and therefore was not a performance of the contract. But the whole contract in the form in which it was executed the Superior Court properly could have

found was based on an honest mistake on the part of the plaintiff with regard to the number of feet of land, which mistake was induced by the false, although not fraudulent, representations of Haines, who was either the defendant's agent in the transaction, or a person who had entered into a contract with the plaintiff and then had assigned his rights under the contract to the defendant.

We are of opinion that a court of equity has the power to permit a party to rescind a contract entered into in the manner above set forth on the ground of mistake, if the other party will not accept performance of the contract omitting the particular stipulation inserted through the mistake. *Noble v. Googins*, 99 Mass. 231. *Spurr v. Benedict*, 99 Mass. 463. *Schramm v. Boston Sugar Refining Co.* 146 Mass. 211. *Rackemann v. Riverbank Improvement Co.* 167 Mass. 1. Story, Eq. Jur. §§ 140 *et seq.*

Whether the facts alleged in the present bill could not have been pleaded in defence to the action at law is a question not before us.

Decree affirmed.

JULIETTE G. DAKIN vs. FRANCIS G. SAVAGE.

Suffolk. March 8, 9, 1898. — September 14, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Construction of Deeds — Trust — Mortgage — Statute of Uses.

In this case, which was a petition for the partition of real estate, the court said that it appeared from the two deeds in question that all parties intended that the grantees in each deed should take the legal estate in fee and in trust, and not as feeoffee or grantees to uses, and that, when the active duties of the trust ceased with the discharge of a mortgage upon the premises which was referred to in each deed, the statute of uses did not of its own force immediately vest the legal estate in the beneficiary and his heirs.

In a case of difficulty depending on nice and not very well defined distinctions, where all the parties legally and equitably interested have acted upon a particular construction of a deed or deeds, it is wise to follow that construction unless it is forbidden by some positive rule of law.

PETITION to the Superior Court, for partition of real estate in Boston. Trial without a jury, before *Hammond*, J., who found .

for the respondent; and the petitioner alleged exceptions, which appear in the opinion.

W. M. Stockbridge, for the petitioner.

M. P. Beckett, for the respondent.

FIELD, C. J. This is a petition for partition by one grandchild of Lois Davis against another. The petitioner is the only child of Celestia W. Chase, a child of Lois Davis, and the respondent is one of the two children of Mary Ann Savage, the other child of Lois Davis. Lois Davis died intestate on May 31, 1852, leaving as her sole heirs Celestia W. Chase and Mary Ann Savage. Celestia W. Chase died intestate on July 9, 1888, leaving no husband, and leaving the petitioner as her only heir. Mary Ann Savage died intestate on June 27, 1892, leaving no husband, and leaving George H. Savage and Francis G. Savage as her only heirs. In 1893, by proceedings in partition between George H. Savage and the respondent, the respondent acquired all the interest of George in the premises.

The contention of the petitioner is that by the first two deeds hereafter mentioned the legal fee in the premises vested in Lois Davis by the operation of the statute of uses when the mortgage referred to in the deed of Oliver Kimball to John Henry, trustee, was discharged, which was on December 2, 1844; that the deed made by Gould, trustee, to Mary Ann Savage and her children, dated April 16, 1851, conveyed no interest whatever in the premises because he had none when the deed was executed; that therefore Lois Davis died seised in fee of the premises, and the title passed by descent, one half to her daughter Celestia W. Chase, and one half to her daughter Mary Ann Savage, and that on the death of the daughters respectively, each daughter's share passed to her child or children.

The contention of the respondent is that the legal fee never vested in Lois Davis, but vested successively in the grantee in each of the two deeds mentioned, as trustee for her until the conveyance made by Gould, trustee, at her request, when the title vested in her daughter Mary Ann Savage for life, remainder in fee in the two children of Mary Ann Savage, and the trust ceased; that if this is not so, Mary Ann Savage and the respondent acquired by adverse possession a title in fee to the whole of the premises; and that, if neither of these conten-

tions can be maintained, the petitioner is estopped by her conduct from maintaining her petition. It is not disputed that Lois Davis and her trustees acted on the belief that the legal title was in the trustees up to the time of the conveyance by Gould, trustee, to Mary Ann Savage for life, remainder in fee to her children, but it is argued that it is immaterial what they thought about it, as the statute of uses takes effect as a positive rule of law.

The first deed, that of Oliver Kimball to John Henry, dated June 11, 1844, purports to be "in consideration of six hundred and twenty dollars and fifteen cents to me paid by John Henry of Boston, in the county of Suffolk, as he is trustee of Mrs. Lois Davis," and to "give, grant, bargain, sell, and convey unto the said John Henry, his heirs and assigns, as trustee as aforesaid and upon the trust hereinafter set forth," the premises. The habendum is as follows: "To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging, to the said John Henry and his heirs and assigns, to the sole use and behoof forever of said Lois Davis, her heirs and assigns, and in trust for her heirs and assigns." The trust set forth in the deed is as follows: "The above lot of land is under mortgage to Arthur W. Austin, and is sold and conveyed subject to that mortgage, the mortgage being for five hundred dollars and interest on that sum from and after the first day of April now last past, and providing for insurance on such building as is agreed to be built thereon, and the said Henry is to perform the conditions of said mortgage, the amount thereof being deducted from the consideration and purchase price above mentioned."

If this be construed as a deed of bargain and sale, the use for Lois Davis and her heirs and assigns would be a use upon a use, which is not within the statute of uses. Under our decisions, the deed can be construed as any form of conveyance necessary to effect the intent of the parties; but it ought not to be construed to be an instrument different from what it purports to be in order to effect a purpose other than that intended by the parties. The intent of the parties certainly was not that John Henry, his heirs and assigns, should be a mere conduit through which the legal estate should pass to Lois Davis, her heirs and assigns, immediately on the delivery of the deed, for the deed

was upon a trust, which, during the existence of the mortgage at least, might require the performance of active duties on the part of the trustee.

The deed of John Henry, "as trustee of Mrs. Lois Davis," to Thomas Gould, dated November 9, 1844, purports to be on a consideration paid by Thomas Gould, "as he is trustee now for the same Lois Davis," and to "sell, transfer, and convey unto said Thomas Gould, his heirs and assigns, as trustee for said Lois Davis and upon the trust hereinafter mentioned and set forth." The trust set forth is in substance the same as in the preceding deed. The habendum is as follows: "To have and to hold the said land and all the buildings thereon, and all the privileges and appurtenances thereto belonging to him, the said Thomas Gould, his heirs and assigns, in trust for the sole use and benefit of her, the said Lois Davis, her heirs and assigns forever. And I, the said John Henry, having had connection with the premises only as trustee for said Lois Davis, and now conveying the same at her request and transferring the trust to said Thomas Gould, am in no wise to be liable to any claim or demand whatever relating to the premises." This in form is not a deed of bargain and sale. The trust, when this deed was made, was still active, as the mortgage referred to had not been discharged, and it is plain on the face of the deed that the grantor regarded himself as seised in fee and in trust, and as conveying the premises at the request of the *cestui que trust* to Gould, his heirs and assigns, to hold upon the same trust as he, the grantor, had held the premises.

Without examining the many nice distinctions which have been taken under the statute of uses between trusts and uses, and having regard to the principle well established that deeds are if possible to take effect according to the manifest intention of the parties, we think it appears from the two deeds first mentioned that all parties intended that the grantee in each deed should take the legal estate in fee and in trust, and not as feoffee or grantee to uses, and that when the active duties of the trust ceased with the discharge of the mortgage the statute of uses did not of its own force immediately vest the legal estate in Lois Davis and her heirs.

The deed of Thomas Gould, trustee, to Mary Ann Savage, for

life, remainder in fee to her children, and the written request of Lois Davis that this deed be executed, show what all the parties who had any legal or equitable interest in the premises then thought about the title.* In a case of difficulty depending on nice and not very well defined distinctions, where all the parties legally and equitably interested have acted upon a particular construction of a deed or deeds, it is wise to follow that construction unless it is forbidden by some positive rule of law, and in the present case the phraseology of the first two deeds is such that we cannot say that the construction which the parties have acted on violates any rule of law. The grantee in each of these deeds undoubtedly took the legal title for the purposes of the trust until the mortgage referred to was discharged, but the effect of the discharge of the mortgage upon the estate of the grantee is not provided for in the deeds. When discharged, the trust ceased, and the natural construction of the deeds is that it then became the duty of the trustee to convey on request the legal estate to Lois Davis and her heirs, or to her assigns. See *Stearns v. Palmer*, 10 Met. 32; *Simonds v. Simonds*, 112 Mass. 157, 164.

We find it unnecessary to consider the other questions argued.

Exceptions overruled.

* This deed was dated April 16, 1851. The written request of Lois Davis, which was of the same date, contained the following: "I . . . do hereby signify that said deed has been prepared in accordance with my instructions and in compliance with my wishes, and I do desire and request my trustee, Mr. Gould, to execute and deliver the same."

OTIS H. WEED *vs.* MAYOR AND ALDERMEN OF BOSTON
& another.

Suffolk. March 10, 1898. — September 16, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Certiorari — Practice — Constitutional Law — Sewer Assessments — Statute.

Where a case is set down for hearing on a petition for a writ of certiorari to quash a sewer assessment and on the answer, all material facts well alleged in the answer and all material facts well alleged in the petition which are not denied or put in issue by the answer, if these facts are consistent with the record of the respondent, must be taken to be true.

Certiorari is a proper remedy to try the question whether assessments made under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," are invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute.

Where, under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," a sewer has been laid out in a strip of land which, though called a street, is not a street but is private property, as are the lots of land bordering thereon, the method of laying assessments on such lots prescribed by the statute is unreasonable and disproportionate; and the statute in this respect is unconstitutional.

PETITION, filed January 12, 1895, for a writ of certiorari, to quash certain sewer assessments made under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston." Hearing before *Morton, J.*, who reported the case for the consideration of the full court upon two questions which are stated in the opinion. If either of them should be answered in the negative, the petition was to be dismissed; if both should be answered in the affirmative, the writ was to issue.

J. W. Pickering, for the petitioner, submitted the case on a brief.

T. M. Babson, for the respondents.

FIELD, C. J. As the case was heard upon the petition and answer, all material facts well alleged in the answer, and all material facts well alleged in the petition which are not denied or put in issue by the answer, and are consistent with the record of the respondents, must be taken to be true. This is in accordance with the practice which has been adopted in proceedings

like the present, when the case is set down for hearing on petition and answer. *Collins v. Holyoke*, 146 Mass. 298. The case has been reserved upon the following questions: "1. Whether certiorari is the proper remedy? 2. Whether the assessment is invalid in law for any reason disclosed by the entire record, or by reason of the unconstitutionality of chapter 402, Acts of 1892?" Certiorari undoubtedly is a proper remedy to try the question whether the assessments are invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute. *Bowditch v. Boston*, 168 Mass. 239. *Holt v. Somerville*, 127 Mass. 408. *Boston v. Boston & Albany Railroad*, 170 Mass. 95.

The report recites as follows: "The respondents did not appeal to the discretion of the court, but admitted that the nature and purpose of the sewer, and the manifest injustice and hardship of the assessments, were such that the writ ought to issue if certiorari was the proper remedy and the act was unconstitutional, or the entire record disclosed such error in law as to warrant the issuing of the writ." The answer of the respondents is not so full and definite as it should have been. It does not contain a statement of the amount of expenses incurred in the construction of the sewer. A schedule of the number of the lots, of the number of feet assessed in each lot, and of the amount of the assessments with reference to each lot, is annexed to the answer. It is impossible to make out from this schedule in what manner the assessments were made. The papers do not disclose whether the expense of constructing the sewer exceeded four dollars for each lineal foot of it or not. In the schedule the amount assessed is sometimes a little more and sometimes a little less than two dollars per lineal foot of the side of the lot assessed nearest to the sewer. The averments of the petition in this respect are as follows: "3. Your petitioner is ignorant as to the actual cost of said sewer, and as to the details of the expenses incurred for the work so ordered and performed as aforesaid, and has no means of ascertaining the same. But the said city of Boston and its said superintendent of streets claimed and claim and insist that the said expenses amounted to four dollars, or more than four dollars, for each lineal foot of said sewer, and that the said expenses, to the amount of four dollars for each

lineal foot of said sewer, constitute by force and by virtue of chapter 402 of the Acts of the year eighteen hundred and ninety-two the assessable cost of said work to be repaid to said city by the owners of the several parcels of land bordering on the strip of land in which said sewer is made. 4. The said superintendent of streets has made or attempted to make an apportionment of the said alleged assessable cost to certain parcels of land claimed and alleged by him to be the several parcels of land bordering on the strip of land in which said sewer is made, and has given notice thereof to your petitioner so far as the same relates to the several parcels of land owned by your petitioner, as hereinafter set forth ; but your petitioner has no means of knowing or ascertaining whether the said apportionment is just and true and in accordance with said act, or otherwise." The averments of the answer in this respect are as follows: " Now come the respondents, and for answer to the plaintiff's petition say that they admit a sewer was constructed in Railroad Street, and the cost thereof assessed upon the estates benefited thereby, including certain land of the petitioner, as alleged in said petition," etc.

In view, however, of the argument addressed to us, the want of a sufficiently definite answer is not very material, because it is not contended in argument that the assessments have not been made in literal compliance with the terms of the statute. The hardship of the case appears from the averments of the petition. The petitioner's land is alleged to be land of little value, which can be made valuable only by filling it and then using it for the erection of buildings. The sewer is a large brick sewer, and is a part of a long main sewer designed principally for draining a considerable territory of valuable land situated at some distance above the land of the petitioner. To assess the cost of such a sewer, or the cost not exceeding four dollars per lineal foot of such a sewer, upon the petitioner's land according to the proportion of the number of lineal feet of the boundaries of his lots on the strip of land in which the sewer has been laid to the number of lineal feet of the boundaries of all lots on said strip, he contends, is grossly unjust.

One contention is that the statute violates Article X. of the Declaration of Rights. But the present proceedings do not

relate to the taking of the petitioner's land for the purpose of constructing the sewer, and to the payment of compensation therefor, but to the assessments upon the petitioner's land for the purpose of collecting in whole or in part the expenses incurred in the construction of the sewer. The strip of land in which the sewer has been laid was taken, as we understand, under other provisions of statute, presumably under Pub. Sts. c. 50, §§ 1-3. The assessments, although local, have been laid by virtue of the taxing power of the Legislature in the method prescribed by St. 1892, c. 402, and the amendments thereof. *Howe v. Cambridge*, 114 Mass. 388. *Chapin v. Worcester*, 124 Mass. 464. *Boston v. Boston & Albany Railroad*, 170 Mass. 95.

It is argued that the statute provides for no appeal from the apportionment of the assessable cost of the sewer made by the superintendent of streets. If the superintendent in determining the assessments has committed any error of law, this may be corrected on certiorari, if material. *Bowditch v. Boston*, *ubi supra*. *Brown v. Fitchburg*, 128 Mass. 282. The petitioner also can apply for an abatement under St. 1896, c. 359, and perhaps under other provisions of statute.

The principal objection to the statute is that it authorizes the cost of a sewer not exceeding four dollars per lineal foot to be assessed upon the owners of abutting land, according to the proportionate length in feet of the boundaries of the different lots of land on the sewer, without regard to the value of the land or to the depth or shape or size of the lots, or the size of the sewer as adapted to the drainage of the lots; that the statute is arbitrary and absolute, and excludes everything in the nature of an adjudication with reference to each lot affected by the construction of the sewer. It is not contended that the present sewer cannot be used to drain the petitioner's lots, but it is contended that the land is not worth the expense of draining it until it has been filled, and that the sewer is larger and more costly than is necessary for that purpose, and that the mode of assessment in its application to lots of different shapes and sizes and to lands of different values is disproportionate and unjust.

Different methods of making assessments for the construction of sewers or drains have been sustained by the courts. *Springfield v. Gay*, 12 Allen, 612. *Butler v. Worcester*, 112 Mass. 541.

Workman v. Worcester, 118 Mass. 168. *Snow v. Fitchburg*, 136 Mass. 183. *Leominster v. Conant*, 139 Mass. 384. *Ayer v. Somerville*, 143 Mass. 585. See *Parsons v. District of Columbia*, 170 U. S. 45. In *Dillon, Mun. Corp.* (4th ed.) §§ 752 *et seq.*, there is a large collection of cases on the subject. The result of the authorities is more specifically stated in § 761, cl. 6, and § 809. Section 809 reads as follows: "The legislation in this country, however, as to the mode of making assessments to pay the expense of constructing sewers, although the burden is usually cast, wholly or in part, on the abutting property, is various. As in other local assessments, so in the case of sewers, the correct principle is that the assessment upon each parcel of contributing property shall be according to the special benefits which the particular parcel receives. Benefit, actual and probable, is the only foundation upon which an assessment can lawfully rest. The Legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but even in the absence of express constitutional restriction, its power is not unlimited. This ascertainment may be made, and usually is, by a separate and actual estimate of special benefits. But where the lots in a town or city are small, of the same depth, and similarly situated, an assessment, under the conditions mentioned in a previous section, may be authorized on the basis of frontage, which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where from the circumstances it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from its adoption," etc. See *In re Washington Avenue*, 69 Penn. St. 352; *Seely v. Pittsburgh*, 82 Penn. St. 360; *State v. Newark*, 8 Vroom, 415; *Thomas v. Gain*, 35 Mich. 155, 162, *Clapp v. Hartford*, 35 Conn. 66; *Cooley*, Const. Lim. 624 *et seq.*

The weight of authority is that an assessment according to the frontage of lots abutting upon a street or public way in a city sometimes may be a reasonable mode of making an assessment for the cost of constructing a sewer in such street or way because of the similarity of the lots, but that such an assessment when

the sewer is not constructed in a street or way or is constructed in the country where the lots abutting are not laid out as building lots, often would be unreasonable. Pub. Sts. c. 50, § 7, is confined to lots on a street or way.

In the present case the order of the board of aldermen of July 11, 1892, directed the superintendent of streets to "make a sewer in a certain unaccepted street called Railroad Street, and in private land . . . located as shown on a plan on file in the office of the superintendent of streets marked 'Roslindale Main Sewer,' and dated July, 1892." The land to be taken is described in Exhibits D and F, annexed to the respondent's answer, wherein it appears that on July 11, 1892, the board of aldermen "Resolved, that it is necessary for the public convenience that a main drain or common sewer should be laid in and through a certain unaccepted street called Railroad Street, in Ward 23, and in and through certain private lands," etc., and they proceeded to take for that purpose a strip of land eight feet wide in a certain unaccepted street called Railroad Street, of which the supposed owners of the fee were William S. Mitchell, Otis S. Weed, Jr., Lewis F. Rogers, and Charles A. Morss. The description of the so called Railroad Street in the petition is as follows: "Said parcel marked and called 'Railroad Street,' and all the other lots above mentioned, consist of low, wet meadow land, unfit for dwelling-houses, and of little or no value for agriculture or pasturage purposes, and not capable of being utilized for any purpose of business or profit, either by erecting buildings thereon or otherwise, without great outlay and expense, especially for filling."

The petitioner, among other things, contends that, "If said act be held to be valid, then the said assessment is void, so far as the same affects said lots of your petitioner, for the reason that none thereof is subject to assessment on account of said sewer under said act, the said lots 1, 2, 16, 17, 18, 19, 20, 21, 22, and 23, and said triangular lot, not abutting on any highway or strip of land within which said sewer is made within the plain meaning and intent of said act." We understand the petitioner to aver that he is the owner in fee of the whole of the parcel called Railroad Street. The meaning of the averments of the petition, as we understand them, when taken in connection with the record, is

that the so called Railroad Street is not a highway or a public street, or a street at all except on paper; that it is merely a long strip of land about forty feet wide, according to a plan of house lots exhibited to us, and that it has not been wrought for travel or used as a street. There is no evidence or suggestion that any lot of land has been conveyed bounding on the so called Railroad Street. The board of aldermen have taken a strip eight feet wide, in or near the centre line of this so called Railroad Street, and in this strip the sewer has been laid. The land bordering on the strip taken is the lot called Railroad Street, on either side of the strip. If the lots according to the plan be considered as separate parcels of land, the lot called Railroad Street is the only lot which borders upon the strip of land taken, so far as the sewer has been laid within the limits of Railroad Street. The lots bordering upon the sides of the lot called Railroad Street do not themselves border on the strip of land which has been taken for the sewer. It may be that, as these lots appear only on the plan and are therefore separate lots only upon paper, the superintendent of streets in making the assessments should have disregarded the plan, and made the assessment upon all the land of the petitioner bordering on each side of the strip of land taken for the sewer. But if this is so, the assessments in their present form cannot be sustained, as, with the exception of lot 15, they purport to be assessments upon lots bordering upon Railroad Street, and not upon land bordering upon the strip of land taken. If the lot called Railroad Street is to be considered as the only lot bordering on the strip of land in which the sewer has been laid, then the whole assessment, so far as the cost of constructing the sewer in Railroad Street is concerned, should have been laid on Railroad Street. It may be that the assessment so laid would be more than the value of the land in Railroad Street. These considerations show the difficulty of applying the statute where the sewer is constructed, not in a street or way, but in a strip of private land taken for the purpose. The lots of land bordering on this strip may vary greatly in shape, size, or depth, and in value per foot, and some lots may be inadequate to bear the burden of the assessments. Assessments under such circumstances, according to the frontage of lots on the strip taken,

may be grossly disproportionate to the benefit to the lots received from the construction of the sewer. Confining ourselves to the present case, where the sewer has been laid, not in a street, but in a strip of private land taken for the purpose, we are of opinion that the method of laying the assessments prescribed by the statute is unreasonable and disproportionate, and that the statute in this respect is unconstitutional. Const. Mass. c. 1, § 1, art. 4. *Writ of certiorari to issue.*

HENRY E. BISHOP, petitioner.

Suffolk. June 22, 1898. — September 21, 1898.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Alleged Error in Sentence — Habeas Corpus — Writ of Error.

It seems that exceptions will not lie in a hearing upon a petition for the writ of habeas corpus.

The general rule is that, where the court has jurisdiction and errs merely in regard to the punishment, relief will not be granted by habeas corpus, but the remedy is by a writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed; although in exceptional cases relief may be granted by habeas corpus or questions of constitutionality considered.

PETITION, for a writ of habeas corpus to the warden of the state prison in Boston, representing that the petitioner was unlawfully deprived of his liberty in said prison. Hearing before *Barker, J.*, who refused to grant the petitioner's prayer, and denied him the writ; and the petitioner alleged exceptions, which appear in the opinion.

C. W. Rowley, for the petitioner.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

MORTON, J. This was a petition for a writ of habeas corpus. The case was heard upon the petition, as is now the more common practice. At the hearing the petitioner requested the court to make certain rulings, which the court refused to do, and ruled

instead "that under the law of Massachusetts, where it is not contended that the conviction is illegal, but only that the sentence imposed is illegal and void, the remedy is not by writ of habeas corpus, but by writ of error," and refused to grant the petition, and denied the writ.

The petitioner excepted to the ruling of the court, and to its refusal to rule as requested. It is doubtful if exceptions will lie in a hearing upon a petition for the writ, or, after the writ has issued, in a hearing upon the question of remanding or discharging the party. *King's case*, 161 Mass. 46. *Wyeth v. Richardson*, 10 Gray, 240. In the latter case, it is said that "the allowance of exceptions would be inconsistent with the object of the writ. The consequence of allowing exceptions must be, either that all further proceedings be stayed, which would be wholly inconsistent with the purpose of the writ; or that the exceptions must be held frivolous, and judgment rendered *non obstante* for the discharge of the party, in which case the exceptions would be unavailing. The allowance of the exceptions being thus inconsistent with the very purpose of the writ, the conclusion must be that the exceptions do not lie." Reference is made to this and other cases in *King's case*, *supra*, and it is there said: "In recent cases questions of law arising on habeas corpus have been reserved, or reported, or adjourned into the full court by a single justice."

But, assuming without deciding that the case is properly before us, we find no error in the ruling of the presiding justice, or in his refusals to rule as requested. All of the requests were addressed to matters relating to the sentence. None of them involved matters affecting the jurisdiction of the court over the offence, or the regularity of the trial, even granting that there might be such irregularity as could be availed of on a petition for a writ of habeas corpus. The general rule is that where the court has jurisdiction, and errs merely in regard to the punishment, relief will not be granted by habeas corpus, but that the remedy is by a writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed. *Riley's case*, 2 Pick. 165, 172. *Sennott's case*, 146 Mass. 489. *Stalker, petitioner*, 167 Mass. 11. *Ex parte Bigelow*, 113 U. S. 328. *In re Belt*, 159 U. S. 95.

In exceptional cases relief may be granted by habeas corpus, or

questions of constitutionality considered. *Feeley's case*, 12 Cush. 598. *Plumley's case*, 156 Mass. 236. We discover nothing in this case which takes it out of the general rule. Without meaning to intimate thereby that the case is properly before us on exceptions, we think the entry must be,

Exceptions overruled.

WILLIAM KINGSLEY vs. CHARLES G. DELANO, executor.

Hampshire. September 20, 1898. — September 22, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Appeal from Judgment of a District Court.

A plaintiff can appeal to the Superior Court from the judgment of a district court in his favor, if the judgment is less than the amount claimed in the declaration.

CONTRACT, upon an account annexed, against the executor of the will of Henry B. Graves. After the former decision, the defendant filed a motion in arrest of judgment, which was overruled in the Superior Court; and he appealed to this court.

C. G. Delano, pro se.

J. B. O'Donnell, for the plaintiff.

FIELD, C. J. This case has once before been considered by this court on exceptions, and is reported in 169 Mass. 285. After the decision there reported, the plaintiff elected to remit \$20, the price of the mare, and the defendant then filed a motion in arrest of judgment, which was overruled, and he appealed to this court. The action was begun in the District Court of Hampshire, and the declaration contained a single count, being on an account annexed. Judgment was rendered in that court for the plaintiff for \$3 damages and the costs of suit. The plaintiff's claim was for \$146.60 and interest. From this judgment the plaintiff appealed to the Superior Court, and the case was there tried, and the jury returned a verdict in favor of the plaintiff for \$151.45.

The defendant now contends that, as the judgment of the

District Court was in favor of the plaintiff, although for a smaller sum than he claimed was due him, the plaintiff could not appeal to the Superior Court. St. 1893, c. 396, § 24, is as follows: "A party aggrieved by the judgment of a district or police court in a civil action may within twenty-four hours after the entry of the judgment appeal therefrom to the Superior Court then next to be held in the county; in which case no execution shall issue on the judgment appealed from, and the case shall be entered, tried, and determined in the court appealed to, in like manner as if it had been originally commenced there." See Pub. Sts. c. 154, § 39; c. 155, § 28; Gen. Sts. c. 120, § 25; c. 116, § 32; Rev. Sts. c. 85, § 13; c. 87, § 36; St. 1783, c. 42, § 6.

The Pub. Sts. c. 198, § 4, distinctly imply that a plaintiff may appeal from a judgment of a police, district, or municipal court, or of a trial justice, in his favor, and make provision concerning costs in such a case. That a plaintiff can appeal from a judgment of a district court in his favor was in effect decided or taken for granted in *Folsom v. Cornell*, 150 Mass. 115. Such always has been the practice. The cases cited by the defendant relate to appeals in cases where there are more than one count or more than one issue, and the appellant has prevailed on some of the counts or issues, and the adverse party has prevailed on others. *Vinal v. Spofford*, 139 Mass. 126. *Smith v. Dickinson*, 140 Mass. 171. *Shepard v. Lawrence*, 141 Mass. 479. A plaintiff is aggrieved by a judgment in his favor, if it is not rendered for all he claimed in his declaration.

The order overruling the motion in arrest of judgment must be,
Affirmed.

HANCOCK NATIONAL BANK vs. D. WARREN ELLIS.

Suffolk. November 16, 17, 1897. — September 23, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Liability of Stockholder of Corporation organized in another State.

By the statutes of Kansas the liability of a stockholder of a corporation there organized to pay the debts of the corporation is several, and may be enforced by an action against the stockholder in a court of competent jurisdiction in the State where the stockholder resides, and can be served with civil process.

FIELD, C. J. This case was once before considered by us on demurrer to the declaration. *Hancock National Bank v. Ellis*, 166 Mass. 414. The demurrer having been overruled, the defendant answered, and the cause was heard by a justice of the Superior Court, without a jury.

At the close of the evidence, both the plaintiff and the defendant made numerous requests for rulings. The presiding justice gave the third, fourth, fifth, sixth, and eighth of the rulings requested by the plaintiff, and all of the rulings requested by the defendant, and made the following special findings:

"1. I find that the Commonwealth Loan and Trust Company ceased to do business on February 21, 1891.

"2. I find from the evidence that such corporation did not resume business thereafter, and that by virtue of the statutory law of Kansas there was a dissolution of the corporation previous to the date of this writ.

"3. There was no legal or competent evidence given at the trial which enabled me to find what were the assets or the liabilities of this corporation at the date of the original judgment against the corporation, or at the date of the issue of execution against it, or at the date of the writ in this action."

The first four rulings requested by the plaintiff which the court gave were as follows:

"3. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corpo-

ration, who pursue the remedy provided by paragraph 1192 of the General Statutes of Kansas of 1889.

"4. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, stockholders in Kansas corporations who appear as stockholders upon the books of the corporation are conclusively presumed to be stockholders of the corporation within the meaning and liability of said paragraph 1192, already referred to.

"5. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, the stockholder's liability under said paragraph 1192, already referred to, is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder; and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of the corporation of an amount equal to the par value of the stock held and owned by him.

"6. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, the stockholder who is liable under said paragraph 1192 is liable to the judgment creditor of the corporation who first pursues his remedy under the statutes, and is discharged from all further liability by once paying the full amount thereof to such creditor."

Among the rulings requested by the plaintiff which the court declined to give is the seventh, which is as follows:

"7. Upon all the evidence in the case, as matter of law, the court is bound to find that, under the laws of Kansas, an action to enforce the stockholder's liability under said paragraph 1192, already referred to, is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

The rulings requested by the defendant which the court gave are to the effect that the obligations imposed by the statutes of Kansas will be enforced in Massachusetts only as a matter of comity; that the courts of Massachusetts will not enforce them against a resident citizen of Massachusetts unless it appears that no injustice will be done; that these courts are unable to do justice to stockholders resident in Massachusetts who have paid the debts of the corporation, and are entitled to sue other

stockholders to enforce contribution, especially if the corporation has been dissolved or has suspended business; that the statutes of Kansas which provide for contribution are a part of a scheme for ultimately compelling stockholders ratably to pay the debts of the corporation, and that, concerning as they do the relations between the corporation and its stockholders, they can be effectually and completely enforced only by the courts of Kansas; and the enforcement of them should be left to those courts.

The Commonwealth Loan and Trust Company is a private corporation, established under the laws of the State of Kansas on February 2, 1887, for the purpose of transacting the business of a loan and trust company, and having places of business at Kansas City in Kansas, and in Missouri, and in the city of Boston in Massachusetts. The plaintiff, the Hancock National Bank of Boston, is the same corporation as the Traders' National Bank of Boston. On September 1, 1891, the Traders' National Bank of Boston, having previously lent the Loan and Trust Company \$25,000, received its promissory note therefor signed by the Loan and Trust Company, indorsed on which appear payments of interest and certain sums of money on account of the principal. On September 9, 1893, the bank commenced suit against the Loan and Trust Company on this note in the Circuit Court of the United States for the District of Kansas, and on December 8, 1893, recovered judgment therein against the Loan and Trust Company in the sum of \$16,136.76, damages, and \$28.45, costs of suit; and on April 27, 1894, execution issued therefor, which was returned on May 29, 1894, by the marshal of the United States for said district wholly unsatisfied, after he had made diligent search for any property of the defendant on which to levy the execution and had found none. The present suit was brought in the Superior Court for the County of Suffolk in this Commonwealth, on May 25, 1895. The defendant is a resident of the Commonwealth. On April 27, 1894, the defendant owned one certificate of five shares of stock of the Loan and Trust Company, and had in his possession as collateral security for the payment of a debt due to him another certificate of five shares, both of which he continued to hold down to the time of the trial here, and the certifi-

cates were produced at the trial. The certificates are each dated February 7, 1887, and they certify that the defendant is the owner of five shares in the capital stock of the Loan and Trust Company, "transferable only on the books of the said company on the surrender of this certificate properly indorsed." They differ only in this, that one certificate describes the defendant as "owner of as collateral security five shares," etc., while the other omits the words "as collateral security." A record of these certificates appears in the transfer book and in the stock ledger of the corporation. On July 16, 1894, by a decree entered in a suit in the Circuit Court of the United States for the District of Kansas, William S. Hinman of Boston, Massachusetts, and Waldo H. Howard of Kansas City, Kansas, were appointed receivers of the Loan and Trust Company, for the purpose of winding up the affairs of the corporation. The order appointing the receivers did not purport to dissolve the corporation. The corporation had been established to exist for fifty years from February 2, 1887, and had a capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each. There was evidence that a great many of the stockholders reside outside of the State of Kansas.

The plaintiff in the present suit put in evidence the General Statutes of Kansas of 1889, paragraphs 1192, 1193, 1199, 1205, 1206, 4080, 4081, 4083, 4084, 4085, 4087, 4167, 4168, 4169, 4170. Paragraphs 1192, 1205, and 1206 are printed in the margin.*

* "1192. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"1205. If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action.

These statutes, so far as material, were in existence for some time before the defendant became the owner of the certificates of stock, and before the organization of the Loan and Trust Company. The plaintiff also put in evidence the official reports of the following decisions of the courts of Kansas: *Howell v. Manglesdorf*, 33 Kans. 194; *Wells v. Robb*, 43 Kans. 201; *Abbey v. Grimes Dry Goods Co.* 44 Kans. 415; *Abbey v. Long*, 44 Kans. 688; *Plumb v. Bank of Enterprise*, 48 Kans. 484; *Hoyt v. Bunker*, 50 Kans. 574; *Howell v. First National Bank*, 52 Kans. 133; *Van Demark v. Barons*, 52 Kans. 779; *Achenbach v. Pomeroy Coal Co.* 2 Kans. App. 357; *United States Wind Engine & Pump Co. v. Davies*, 2 Kans. App. 611; *Buist v. Citizens' Savings Bank*, 4 Kans. App. 700. The defendant, subject to the exception of the plaintiff, put in evidence the General Statutes of the State of Kansas of 1889, Article 12 of the Constitution, paragraph 211, and paragraphs 1200 and 1204 of the statutes which are printed in the margin,* and also the official report of the decision of the Supreme Court of Kansas in *Hentig v. James*, 22 Kans. 326.

"1206. No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him."

* "211. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

"1200. A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"1204. If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the col-

The courts of Kansas, from the nature of the question, can never directly decide that the liability of a stockholder, under paragraph 1192 of the General Statutes of Kansas, is one that may be enforced in any court of general jurisdiction in any other State or country where due service of process can be made upon the stockholder. Only courts of other jurisdictions can decide that question. The courts of Kansas can only express an opinion to that effect, if they entertain it in cases before them, as one of the reasons for the judgment they render in those cases. That opinion the Supreme Court of Kansas has expressed in *Howell v. Manglesdorf*, 33 Kans. 194, 195. The other decisions cited of the courts of last resort in Kansas tend to confirm that opinion. None is inconsistent with it. The courts of the United States inferior to the Supreme Court have uniformly held that the liability under the statutes of Kansas which we are considering can be enforced against a stockholder in any State or district where he can properly be served with process. *Whitman v. National Bank of Oxford*, 51 U. S. App. 536, affirming on error the judgment of the Circuit Court in *National Bank of Oxford v. Whitman*, 76 Fed. Rep. 697. *Brown v. Trail*, 89 Fed. Rep. 641. *American Freehold Land Mortgage Co. v. Woodworth*, 79 Fed. Rep. 951; *S. C.* 82 Fed. Rep. 269. *McVickar v. Jones*, 70 Fed. Rep. 754. *Rhodes v. United States National Bank*, 66 Fed. Rep. 512. *Bank of North America v. Rindge*, 57 Fed. Rep. 279. See *Auer v. Lombard*, 72 Fed. Rep. 209; *Mechanics' Savings Bank v. Fidelity Insurance, Trust, & Safe Deposit Co.* 87 Fed. Rep. 113. These decisions are in accordance with the principles of the decisions of the Supreme Court of the United States with reference to statutes of other States somewhat similar to those of Kansas. *Flash v. Conn*, 109 U. S. 371. *Huntington v. Attrill*, 146 U. S. 657.

The decisions of State courts other than those of Kansas are not uniform upon the question whether the statutory liability of

lection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

a stockholder to creditors of the corporation under these statutes of Kansas can be enforced by a suit against the stockholder in any State where he resides, and can be served with process. In favor of such a doctrine are *Guerney v. Moore*, 131 Mo. 650; *Bagley v. Tyler*, 43 Mo. App. 195; and *Ferguson v. Sherman*, 116 Cal. 169. See *Cushing v. Perot*, 175 Penn. St. 66. *Contra* are *Fowler v. Lamson*, 146 Ill. 472; *Tuttle v. National Bank of the Republic*, 161 Ill. 497; and *Hancock National Bank v. Farnum*, 20 R. I. . *Marshall v. Sherman*, 148 N. Y. 9, is a case which arose upon demurrer, and somewhat resembles *Bank of North America v. Rindge*, 154 Mass. 203, and the decision in both depended upon the averments of the declaration.

This court has many times decided that the statutes of other States, creating the liability of stockholders to creditors of a corporation, which provide for a suit of a special kind to which the corporation and all the stockholders are to be made parties, will not in general be enforced by the courts of this State. It often happens that the courts of this State could acquire no jurisdiction over the corporation which is a necessary party, or over many of the stockholders, and the suit itself is sometimes of a kind unknown to our laws. The proper courts of the State under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of assessments ratably upon all stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes. The special remedy provided by the statutes must be pursued, and, as the statutes of a State have no force *ex proprio vigore* beyond the territorial limits of the State, the remedy usually must be pursued in the State where the corporation has been established and the statutes passed. *Erickson v. Nesmith*, 15 Gray, 221; *S. C.* 4 Allen, 233. *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349. *Post v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341. *Bank of North America v. Rindge*, 154 Mass. 203. *Coffing v. Dodge*,

167 Mass. 231. See *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Lowry v. Inman*, 46 N. Y. 119; *May v. Blac.* 77 Wis. 101, 107; *Rice v. Merrimack Hosiery Co.* 56 N. H. 114; *Nimick v. Mingo Iron Works*, 25 W. Va. 184.

In *Higgins v. Central New England & Western Railroad*, 155 Mass. 176, the grounds on which the courts of this State entertain an action at law founded on the statutes of another State are stated to be as follows: "Assuming that the cause of action is one not existing at the common law, but created by the statute of another State, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. *Blanchard v. Russell*, 13 Mass. 1, 6. *Prentiss v. Savage*, 13 Mass. 20, 24. *Ingraham v. Geyer*, 13 Mass. 146. *Tuppan v. Poor*, 15 Mass. 419. *Zipcey v. Thompson*, 1 Gray, 243, 245. *Erickson v. Nesmith*, 15 Gray, 221, and 4 Allen, 233, 236. *Halsey v. McLean*, 12 Allen, 438, 443. *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 353. *Bank of North America v. Rindge*, 154 Mass. 203."

In *Post v. Toledo, Cincinnati, & St. Louis Railroad*, *ubi supra*, this court say: "The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the

payment of the debts of the corporation is *quasi ex contractu*. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the people or the Legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporations. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member; see *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516; and although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our laws that even citizens of Massachusetts, who voluntarily have become stockholders in Ohio corporations, should not be held to perform the obligations imposed by those laws."

When the liability is distinctly imposed by statute upon the stockholders severally, it would be unfortunate if it could not be enforced against stockholders not resident within the State under whose laws the corporation has been established, on the ground that due process could not be served on them within that State, and the courts of the State where they reside would not take jurisdiction of suits to enforce the liability.

It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders.

The remedy provided by paragraphs 1200 and 1204 of the General Statutes of Kansas, even if applicable to the present case, was not intended to be exclusive when a judgment has been obtained against the corporation. The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those

statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally, and not jointly. The stockholder who pays more than his proportion of any debt of the corporation may compel contribution from the other stockholders by action. The creditor of the corporation can by action collect the amount of his judgment remaining unpaid of any stockholder, "to any extent equal to the amount of stock by him or her owned, together with any amount unpaid thereon." The stockholder is discharged as against all creditors of the corporation when he has paid the debts of the corporation to this extent. We are unable to see in what manner the enforcement of these statutes by the courts of Massachusetts against stockholders resident here, at the instance of a creditor of the corporation, does any injustice to the citizens of Massachusetts. If they pay what they are required to pay, they have the same remedy for contribution which any other stockholders have. This remedy may be difficult to enforce, because the stockholders may reside in many different States or countries; but the same remedy for contribution is given to all stockholders wherever they reside. The Legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation. This somewhat resembles the law of Massachusetts whereby judgment creditors of cities and towns can levy execution on the property of any inhabitant, and such inhabitant is left to enforce contribution from the other inhabitants. Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the State or country under which the corporations are organized, and they cannot complain if this liability is enforced against them.

We are unable to assent to the decision of the Supreme Court of Pennsylvania in *Cushing v. Perot*, 175 Penn. St. 66, that the liability of the defendant passed to the receivers of the corpora-

tion as an asset of the corporation, because we think that the liability as created by the statutes of Kansas is directly to the creditors, and cannot be enforced by receivers in their own names or in the name of the corporation. *Hancock National Bank v. Ellis*, 166 Mass. 414, 419. *National Bank of Barre v. Hingham Manuf. Co.* 127 Mass. 563, 567. *Chamberlin v. Huguenot Manuf. Co.* 118 Mass. 532.

The law of Kansas was a fact to be proved in the present suit. Where the evidence of foreign law consists entirely of statutes or reports of judicial decisions, the constructions and effects of the statutes and decisions are usually for the court alone. *Bride v. Clark*, 161 Mass. 130. *Reyer v. Odd Fellows' Fraternal Accident Association*, 157 Mass. 367. *Gibson v. Manufacturers' Ins. Co.* 144 Mass. 81. Where the decisions are conflicting, or where inferences of fact must be drawn, the question of what the law is becomes one of fact. *Wylie v. Cotter*, 170 Mass. 356.

Upon the evidence introduced at the trial, a majority of the court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889 was intended to be a transitory action of such a nature that it might be brought in any court of general jurisdiction over similar actions in any State or country where service according to the laws of that State or country could be made upon a stockholder.

They are of opinion that the Superior Court should have found in accordance with the seventh request of the plaintiff. This almost necessarily follows in the view they have taken of the statutes of Kansas, from the four rulings requested by the plaintiff which the court gave, whether they be regarded as rulings of law or findings of fact. It is unnecessary now to consider the other questions which have been argued, or which appear in the bill of exceptions. The entry must be,

Exceptions sustained.

W. R. Bigelow, (*H. J. Jaquith* with him,) for the plaintiff.

A. Hemenway & E. B. Adams, for the defendant.

FRANK D. GLEASON vs. FREEBORN G. SMITH.

Worcester. October 3, 1898. — October 19, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Negligence — Dangerous Machine — Assumption of Risk — Action — Evidence.

A person of several years' experience, who is employed to work upon a moulding machine, and who is injured by having his hand come in contact with the revolving knives on the machine, which is an ordinary machine in perfect condition, cannot maintain an action against his employer for his injury, on the ground that he was negligently set to work upon a dangerous machine without warning him of the danger, because a guard, which is no part of the machine, but an appliance made by workmen using the machine without request or direction of the employer, was not so wide as one which he had previously used elsewhere, and did not cover the whole sweep of the knives; and evidence of experts to show that this machine was in their opinion very dangerous is rightly excluded.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ. Trial in the Superior Court, before Bond, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

A. P. Rugg, for the plaintiff.

E. P. Pierce, for the defendant, was not called upon.

KNOWLTON, J. The plaintiff was employed by the defendant as a moulder in a wood working shop where piano cases were manufactured, and while working upon a machine moulding the top of a piano his thumb and two fingers were cut off. He contends that the defendant was negligent in setting him to work upon a dangerous machine without warning him of the danger. The only objection which he now makes to the machine is that a guard used upon it was not so wide as it should have been,

The plaintiff testified that he had been a moulder ten years or more, and had worked for the defendant in this shop about four years prior to the accident, and before working for the defendant had worked in four other shops where work was done similar to that done by the defendant. In these shops he had worked two years upon a machine like that upon which he was

injured, except in respect to its guard. In the defendant's shop he had worked moulding pieces of wood smaller than piano tops, upon machines whose working was similar to that upon which he was injured, but he had never worked upon that particular machine until the day of the accident. He testified that he knew that guards or springs are not made or furnished by manufacturers of moulding machines, and that the machines made no provision for the attachment of guards or springs; that they are not ordinarily provided by employers for use upon machines; that in every instance, so far as he knew, they were made by the workmen without request or direction of employers, when the work was such that they could use them; that when he worked in another shop moulding piano tops he had made one similar to that upon the defendant's machine, except that it covered the whole sweep of the knives, and that he made it from his own experience and judgment, without request from his employer.

The guard on the defendant's machine had been made five or six years before the accident by some workmen employed in the defendant's shop, and had been used as the work done there required ever since. It was there when the plaintiff entered the defendant's service, and was the only one that had been in the shop during the time that he worked there. It was used only when piano tops were being moulded. It was not imperfect or defective in form or material, except that it did not cover the entire sweep of the knives, and did not furnish so much protection to the workmen as if it had been wider.

The plaintiff, while working upon the machine, saw a defect in the board that was being moulded, and put his hand along the outer edge of the guard to examine the defect and to discover by the sense of feeling just what it was. His fingers came in contact with the rapidly revolving knives, and were cut.

We need not consider the question whether there was any evidence that the plaintiff was in the exercise of due care, for we are of opinion that there was no evidence of negligence on the part of the defendant. The plaintiff contracted to work as a moulder, and he impliedly agreed to assume the risk of working upon ordinary moulding machines. The machine on which he was injured was an ordinary machine in perfect condition. A

guard, which was no part of the machine, but was an appliance made by the workmen using the machine, was not so wide as one which the plaintiff had previously made before he was employed by the defendant. If there was negligence in that part of the business which is ordinarily done by employees in connection with the use of their machines, it was one of the risks of the business assumed by the plaintiff in entering the service. Even if the machine and its guard be considered together as something to be furnished complete by the defendant for the particular work which the plaintiff was doing, the defendant was not bound to change the construction of the machine if its condition was open and obvious when the plaintiff contracted to work in the business, and if there were no concealed dangers which one about to enter the service could not readily discover. That the plaintiff did not in fact know of the particular danger when he made his contract is immaterial, if, with the exercise of due diligence, he might have known it. *Murch v. Thomas Wilson's Sons*, 168 Mass. 408. *O'Maley v. South Boston Gas Light Co.* 158 Mass. 135. *Fisk v. Fitchburg Railroad*, 158 Mass. 238. *Goodridge v. Washington Mills Co.* 160 Mass. 234. *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153. *Goodes v. Boston & Albany Railroad*, 162 Mass. 287.

Although the plaintiff could not see the knives when the machine was in operation, there is nothing to indicate that an examination of the machine when it was at rest would not have shown that the guard did not fully cover the knives. If the plaintiff had chosen to use them, he evidently had all the means of seeing the relation of the guard to the knives which the workmen had who made the guard. He put his thumb and fingers against the knives without making an examination. The defendant had no reason to suppose that he needed instruction in regard to this danger, and owed him no duty either to change the guards or to give him instruction or warning about it.

The testimony of experts, to show that this machine was in their opinion very dangerous, was rightly excluded. The elements and the degree of the danger involved in using it could be understood by persons of common intelligence without the aid of experts.

Exceptions overruled.

ALBERT W. WEEKS *vs.* ISRAEL L. CURRIER & another.

Worcester. October 3, 4, 1898. — October 19, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Deed — False Representations — Equity — Alleged Remedy at Law —
Writ of Entry — Deceit — Agency.*

A. executed a deed of his land, without inserting the name of the grantee in the blank spaces left for it and delivered it to B., who was the agent of C., and B. afterwards filled the blanks with the name of C., caused D. to write his name as a witness upon the deed, although D. did not see A. or his wife sign it, and then had it recorded in the county in another State, in which the land was situated. A. was induced to sign and deliver the deed by representations of B. that a house and lot in this Commonwealth owned by C., which were in the hands of B. for sale and which were conveyed to A. in exchange for the property described in the deed from A., had recently been sold for thirty-two hundred dollars, were rented for fourteen dollars per month, and had only certain named encumbrances upon them, all of which representations were false, were made by B. as of matters within his personal knowledge, and were relied upon by A. as inducements to make the contract. A. offered to reconvey the property conveyed to him by C., and demanded a conveyance to himself of the property described in the deed delivered to B. *Held*, that relief might be granted to A. in equity to compel a reconveyance, and that the fact that B., to whom C. had conveyed the property fraudulently obtained, had expended some money upon it, did not relieve him from the obligation to return it.

Since the enactment of St. 1877, c. 178, (Pub. Sts. c. 151, § 4,) relief may be had in equity to set aside a deed of real estate procured by fraud, and to obtain a reconveyance. The remedy at law by a writ of entry is concurrent.

Fraudulent representations and oral misstatements made with intent to deceive are not so merged in a written instrument procured by means of them that they may not be made the basis of a decree to set it aside.

If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive.

In a suit in equity to compel the reconveyance of property obtained by false and fraudulent representations, a defendant is affected by those representations made by another while acting as his agent, within the scope of his authority, as if he had made them himself.

BILL IN EQUITY, against Israel L. Currier and David A. Curry, filed July 12, 1897, in the Superior Court, seeking to have certain conveyances set aside and for other relief. The defendants filed a demurrer, assigning as grounds therefor: 1. That there was a full, adequate, and complete remedy at law. 2. That

there was no allegation that the alleged insertion of the name of an attesting witness to the execution of a deed was made in fraud. 3. That relief could not be granted by reason of any alleged agreement, representation, or other oral statement, alleged to have been made by Currier or by the plaintiff, before the execution and delivery of the deeds set forth in the bill. The defendants having answered, there was a hearing before *Dewey, J.*, who found the facts "so that, if in the opinion of the court the demurrers should be overruled, there still might be a final disposition of the case." The judge, at the request of the parties, reported the case for the consideration of this court, to be disposed of on the demurrer or upon so much of the facts found as were competent, or in such other manner as to the court should seem proper. The findings and all material facts appear in the opinion.

A. P. Rugg, for the plaintiff.

H. Parker, for the defendants.

KNOWLTON, J. This case comes before us on a report containing a finding of facts, and showing that the defendants joined an answer in demurrer with their answer in matters of fact. The judge found that the plaintiff made a deed of his land which was executed without inserting the name of the grantee in the blank spaces left for it, and was delivered to the defendant Currier. Currier was acting as an agent and broker for the defendant Curry, and afterwards he filled the blanks with the name of Curry, caused one Mulvey to write his name as a witness upon the deed, although Mulvey did not see the plaintiff or his wife sign it, and then caused it to be recorded in the registry in the county in New Hampshire where the land was situated. The judge also found that the plaintiff was induced to sign and deliver it by representations of Currier that a house and lot in Worcester in this Commonwealth owned by Curry, which were in the hands of Currier for sale, and which were conveyed to the plaintiff in exchange for the property described in the deed from the plaintiff, had recently been sold for thirty-two hundred dollars; that they were rented for fourteen dollars per month, and that there were only certain named encumbrances upon the property. All of these representations were false. They were made by Currier as of matters within his personal knowledge,

and they were relied upon by the plaintiff as inducements to make the contract. The plaintiff offered to reconvey the property conveyed to him by Curry, and demanded a conveyance to himself of the property described in the deed delivered to Currier. These facts are all set out in the plaintiff's bill, and the representations are alleged to have been fraudulently made by the defendants.

The principal ground of the demurrer is that the plaintiff cannot have relief in equity because he has a full, adequate, and complete remedy at law. Since the enactment of St. 1877, c. 178, (Pub. Sts. c. 151, § 4,) relief may be had in this Commonwealth in equity to set aside a deed of real estate procured by fraud and to obtain a reconveyance. The remedy at law by a writ of entry is concurrent. *Billings v. Mann*, 156 Mass. 203. *Emerson v. Atkinson*, 159 Mass. 356, 361. *Nathan v. Nathan*, 166 Mass. 294.

Fraudulent representations and oral misstatements made with intent to deceive are not so merged in a written instrument procured by means of them that they may not be made the basis of a decree to set it aside. The demurrer must therefore be overruled.

It follows upon the facts found that the plaintiff is entitled to a decree against the defendants. The false statements found to have been made were material, and, being relied upon, they entered into the substance of the contract. *Medbury v. Watson*, 6 Met. 246, 260. *Manning v. Albee*, 11 Allen, 520, 522. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive. *Litchfield v. Hutchinson*, 117 Mass. 195. *Burns v. Dockray*, 156 Mass. 135. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. *Milliken v. Thorndike*, 103 Mass. 382.

In a suit of this kind a defendant is affected by a false and fraudulent representation, made by another while acting as his agent within the scope of his authority, as if he had made it himself. *Haskell v. Starbird*, 152 Mass. 117.

That Currier has expended some money upon the property fraudulently obtained, the same having been conveyed to him by

Curry, does not relieve him from the obligation to return it. *Snow v. Alley*, 144 Mass. 546, 552.

The facts found by the judge fully establish the right of the plaintiff to a reconveyance. Without considering the effect of the unauthorized changes made in the deed after it was signed, there must be a
Decree for the plaintiff.

EDWARD A. KEEVAN vs. MELVIN H. WALKER & another.

Worcester. October 4, 1898. — October 19, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Personal Injuries — Master and Servant — Defective Machine —
Negligence — Due Care.*

A. reported the defective condition of a machine upon which he was working to his employer, who sent B. to fix it. B. made a slight repair upon it, but did not remedy the real defect, although promising on that and a later occasion to do so. A. then called it to the attention of the foreman of the room, who examined it, and promised to have it fixed at once. Work was stopped in that part of the shop for several days afterwards, and upon A.'s return to work he used the machine and was injured by reason of the defect. *Held*, in an action both at common law and under the employers' liability act, St. 1887, c. 270, against his employer for his injury, that he was entitled to go to the jury, who would be warranted in finding that the defendant was negligent, and that the plaintiff was in the exercise of due care in resuming work upon the machine without making a particular examination of it.

TORT, for personal injuries sustained by the plaintiff on June 14, 1897, while in the employ of the defendants as a moulder of sole leather at their factory in Westborough. The declaration contained three counts, the first at common law, and the second and third under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Bond, J.*, who ruled that there was no evidence upon which to submit the case to the jury, and directed them to return a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. B. Ratigan & M. J. Lyden, for the plaintiff.

F. B. Smith, (W. S. B. Hopkins with him,) for the defendants.

KNOWLTON, J. There was evidence that a machine belonging to the defendants, on which the plaintiff was working, was out of repair, so that the lower part of the die, which should have remained at rest until it was moved up by the application of the foot to a treadle, moved upward immediately after it had come down to its place, and struck the plaintiff's finger against the upper part of the die and cut it off. The plaintiff testified that on the front, near the treadle, there was a brake made of iron, faced with leather on the inside next to the power. As the treadle was pressed down, the brake pulled away from the pulley and the machine started. Ordinarily the machine would not operate unless the treadle was pressed down. He said that on June 4 he noticed that the brake would not stop the power, but that it let the shaft revolve when he took his foot off the treadle. Upon examining the leather upon the brake he found it was worn. He also said that at the same time the cogs were worn and slipped. According to his testimony he then told one of the defendants, who said he would have one Billings come down and fix it. Billings came down and put in a screw where one was needed, and the plaintiff said to Billings, "You might just as well fix up that brake, and everything then will probably be in running order." Billings said he had not time that night, but promised to do it some other time. On the following Monday, the plaintiff again called Billings's attention to fixing the brake, and told him "that the mould used to come up part ways on to the die, and that it was liable to catch him." Billings promised to fix it, and went away. On Wednesday, June 9, the mould went up and down twice, and the plaintiff found that a screw was loose and that the brake did not work, and he tightened the screw himself. At the same time he called the attention of the foreman of the room to it.

The foreman promised to look after it and have it fixed. The work in the part of the shop in which the plaintiff was working was stopped from that day until the following Monday. He and the foreman looked at the brake again, and the foreman said, "Yes, that does need fixing; I will have it fixed right off." The plaintiff went away and did not work on the machine again until the afternoon of the following Monday, when he was injured.

If the testimony of the plaintiff was believed, the jury would

have been well warranted in finding negligence on the part of the defendant. They might also have found that the plaintiff, when he returned to his work on Monday, had good reason to suppose that the brake had been repaired and was in perfect condition, and have found accordingly that he was in the exercise of due care in working upon the machine without making a particular examination of it.

The case should have been submitted to the jury.

Exceptions sustained.

COMMONWEALTH vs. ELIJAH L. HUBLEY.

Worcester. October 5, 1898. — October 19, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, & BARKER, JJ.

Valid City Ordinance forbidding the Dealing in Rags and Paper.

An ordinance of the city of Worcester, which provides that "No person shall carry on the business of collecting, storing, or dealing in old rags, old papers, or other such refuse material, in any building within a circle the radius of which is two miles from the intersection of the south line of Front Street and the east line of Main Street, unless he is duly licensed therefor by the board of aldermen, for which license, if granted, no fee shall be charged," is valid.

COMPLAINT for the violation of an ordinance of the city of Worcester. At the trial in the Superior Court, before *Hopkins, J.*, the case was submitted to the jury upon an agreed statement of facts. The defendant contended that the ordinance was void.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. J. Taft, for the defendant.

H. Parker, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

KNOWLTON, J. The defendant was convicted of a violation of an ordinance of the city of Worcester, which is as follows: "An Ordinance to regulate the collecting and storage of old rags, old papers, or other refuse material. Section 1. No person shall carry on the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material, in any build-

ing within a circle the radius of which is two miles from the intersection of the south line of Front Street and the east line of Main Street, unless he is duly licensed therefor by the board of aldermen, for which license, if granted, no fee shall be charged." The only question in the case is whether the ordinance is valid. By its charter the city of Worcester has all the rights to pass ordinances that are given to cities and towns by general laws. St. 1893, c. 444, § 19. Under the Pub. Sts. c. 27, § 15, towns may make "such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare," for the following purposes among others, namely, "for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." By-laws and ordinances looking to the preservation of the public health are plainly within the authority conferred by this section. See *Commonwealth v. Parks*, 155 Mass. 531. The authority given by the Pub. Sts. c. 80, §§ 18, 84, to boards of health of towns to make regulations and pass orders in reference to certain matters affecting the health of the community, cannot properly be construed to prevent the passage of reasonable by-laws by towns, under the authority of Pub. Sts. c. 27, § 15. *Commonwealth v. Parks*, 155 Mass. 531, 533. Special authority is given by the Pub. Sts. c. 80, § 18, to a board of health "respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness brought into or conveyed from its town." It is manifest that old rags may be very dangerous in this respect. The case of *Train v. Boston Disinfecting Co.* 144 Mass. 523, fully recognizes the reasonableness of provisions regulating the business of dealing in rags.

Besides the authority found in the statute already quoted, we have in the Pub. Sts. c. 102, § 28, a provision for licensing "dealers in and keepers of shops for the purchase, sale, or barter of junk, old metals, or second hand articles." There is certainly strong ground for the argument of the District Attorney that dealing in rags is within the express language of this statute.

We are of opinion that it was not unreasonable for the city of Worcester to forbid the business of collecting, storing, and dealing in rags within the thickly settled portions of the city except when conducted by licensed persons. The safety of the com-

munity might be found to require that only persons who could be trusted to observe proper precautions should be permitted to carry on this business. When the interests of individuals conflict with the rights of the public, the individual interest must yield to the paramount right. *Watertown v. Mayo*, 109 Mass. 815. *Train v. Boston Disinfecting Co.* 144 Mass. 523. *Newton v. Joyce*, 166 Mass. 83. *Exceptions overruled.*

NEW ENGLAND THEOSOPHICAL CORPORATION vs. BOARD OF
ASSESSORS OF THE CITY OF BOSTON.

SAME vs. SAME.

Suffolk. January 19, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

“*Literary, Benevolent, Charitable, or Scientific Institution*” — *Exemption from Taxation.*

Where the paramount object of a corporation, organized under Pub. Sts. c. 115, is the dissemination of theosophical ideas, and the procuring of converts thereto, and everything else is subordinate, on an appeal to the Superior Court from the decision of the board of assessors, under St. 1890, c. 127, refusing an abatement of the petitioner's taxes, the finding of the judge that the petitioner is not a literary, benevolent, charitable, or scientific institution within the meaning of the Pub. Sts. c. 11, § 5, cl. 3, as amended by the St. of 1889, c. 465, will not be disturbed.

TWO PETITIONS for the abatement of taxes assessed upon the petitioner's land and building. Trial in the Superior Court, upon appeals, without a jury, before *Sheldon, J.*, who found for the respondent, and, at the request of the parties, reported the cases for the determination of this court. If the ruling was correct, judgment was to be entered for the respondent for its expenses and costs; otherwise, judgment was to be entered for abatement in accordance with the prayer of the petition. The facts appear in the opinion.

G. D. Ayers, for the petitioner.

S. M. Child, for the respondent.

LATHROP, J. These are two proceedings under the St. of 1890, c. 127, for the abatement of taxes assessed as of May 1, 1894 and 1895, respectively, on a parcel of land on Mount Vernon Street in Boston. The case comes before us on reports of the justice of the Superior Court, who heard the cases, and who found and ruled as follows: "I find that the witnesses at the hearing testified truthfully, and rule that on all the evidence I am not required to find that the real estate of the petitioner, or any part thereof, was exempt from taxation." The reports state that the only witnesses at the trial were the petitioner's treasurer, called by the petitioner, and its president, who also acted as counsel, called by the defendant. The reports further state that there was evidence tending to show certain facts, and give portions of the evidence of the two witnesses. The judge has made no findings of fact, and we are left to gather the facts from the evidence, which is not a satisfactory way of having cases presented to us. The question before us is whether, as matter of law, the justice of the court below was bound to abate the tax assessed in either or both of the years above mentioned.

The petitioner was organized in 1893, under the Pub. Sts. c. 115, and received under § 13 a certificate from the Secretary of the Commonwealth, in which the purposes of the corporation are thus set forth: "for the purpose of literary, benevolent, charitable, and scientific purposes; more particularly to assist the Theosophical Society in its three objects, (1) forming the nucleus of a Universal Brotherhood of Humanity, without distinction of race, creed, sex, caste, or color; (2) promoting the study of Aryan and other Eastern literatures, religions, and sciences, and demonstrating their importance; (3) investigating unexplained laws of nature and the psychical powers latent in man; for mutual improvement in religious and philosophical knowledge; in the furtherance of religious and philosophical opinions; for maintaining a library or libraries of theosophical and cognate books; for printing and publishing theosophical literature." It is further declared in the certificate: "No person can become a member of this corporation without being a member of the Theosophical Society, which was founded in New York, November 17, 1875, and has now its headquarters in India."

After this certificate was obtained, the petitioner acquired title to the premises taxed. This is a lot of land with a building thereon, formerly a dwelling-house, containing about twenty rooms of good size. The reports state: "The evidence tended to show that the work carried on by the corporation and the branch organizations and individuals who assisted the corporation was of a very general character, corresponding to the objects named in the charter, and consisting of editing the 'Theosophical News,' sending out press reports and articles to various papers by means of the 'Press Bureau' of the New England Committee for theosophical work; . . . that several branch organizations, engaged in various departments of the same work described in the purposes of the main corporation as shown by the charter, occupied various rooms in said building, some of whom subscribed a certain amount weekly to the support of the parent corporation, the petitioner." One room, in 1894, was occupied by a newspaper reporter, who worked for his newspaper at night and slept during the day, and when he was not asleep did some work for the petitioner, in the way of writing and addressing letters. A large number of other rooms were let to various theosophical workers, and they respectively paid a small rental for the same in proportion to their respective means, some of these being engaged in other occupations during the day. In 1894, a man and his wife occupied one of the rooms. On May 1, 1895, the wife, who was a member of the corporation, was temporarily in Europe, and the man, who was not a member, occupied the room and continued to occupy it.

The petitioner contends that the evidence shows that the corporation was a "literary, benevolent, charitable, and scientific institution," and so exempt from taxation under the Pub. Sts. c. 11, § 5, cl. 3, as amended by the St. of 1889, c. 465.

We see no ground upon which it can be said that the judge was bound to hold that the petitioner was either a benevolent or a charitable institution. The word "benevolent" may include purposes which may be deemed charitable by a court of equity, and it may also include "acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works,

or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense." *Chamberlain v. Stearns*, 111 Mass. 267. See also *Massachusetts Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24.

The word "charitable" refers to hospitals and other charitable institutions for the relief of the poor or the sick. The reason of this exemption is that they render a service to the public, and so relieve the State or municipality from expense. See *Cooley on Taxation*, (2d ed.) 202.

The purpose of "forming the nucleus of a Universal Brotherhood of Humanity" is too indefinite an expression to enable us to say, on the evidence, that the judge was wrong in holding that the petitioner was not a benevolent or a charitable institution.

The judge was not bound to hold that this was a scientific institution. While the term "scientific" may not be limited to the physical sciences, yet there is nothing in the evidence to show that there is any study or application of science, even in the broadest sense of the word, in theosophy. But even if there is any connection between theosophy and any kind of science, it is only incidental to the study and promulgation of a system of speculative philosophy. To make an institution scientific, it should be devoted either to the sciences generally, or to some department of science as a principal object, and not merely as an unimportant incident to its important objects.

The word "literary" has no technical legal meaning, and there is some difference of opinion as to what is meant in statutes exempting literary institutions or societies from taxation. In England it is held that a school for educating teachers organized under the St. 6 & 7 Vict: c. 36, is not a literary society. *Regina v. Pocock*, 8 Q. B. 729. See also *Indianapolis v. McLean*, 8 Ind. 328; *Philadelphia v. Public Schools*, 170 Penn. St. 257; *Kendrick v. Farquhar*, 8 Ohio, 189.

In *Wesleyan Academy v. Wilbraham*, 99 Mass. 599, it was said by Chief Justice Chapman, in considering the exemption of the academy from taxation: "The academy of the plaintiffs is a literary and scientific institution duly incorporated, and the only questions that are raised in the case relate to the character of the property which the defendants have assessed." The insti-

tution in this case was incorporated by the St. of 1823, c. 80, "for the purpose of promoting religion and morality, and for the education of youth in such of the liberal arts and sciences as the trustees for the time being shall direct."

In *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, it was conceded that the plaintiff was one of the institutions exempt from taxation by the Pub. Sts. c. 11, § 5, cl. 3, and the court said that it was "very properly conceded." The institution in this case was organized, under the Pub. Sts. c. 115, for the "education of boys."

We have no occasion, however, to inquire whether a building owned by a corporation formed for the purposes of education is exempt from taxation, when a similar building used for the same purposes would not be if owned by private individuals, as we are of opinion that the judge was not bound to find that the petitioner is a literary institution within the meaning of the statute.

The paramount object of the petitioner is the dissemination of theosophical ideas, and the procuring of converts thereto. Everything else is subordinate. The fact that in furtherance of this object books are collected, instruction given, and literary work done, does not make the petitioner a literary institution. To hold otherwise would be to permit any seven men who believed in any particular theory on any subject to live free from taxation by forming a corporation, buying a house, living in it, editing a newspaper, and writing articles to other newspapers in favor of their views, with the hope of gaining converts. This is not, in our view, the intent of the Legislature.

According to the terms of the reports, judgment is to be entered in each case for the respondent for its expenses and costs.

So ordered.

JOHN H. BLOOD vs. NORMAN L. MILLARD.

Berkshire. September 13, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Deed — Easement — Equity.

A deed of land in fee conveyed also "the right to a trench or ditch, and to lay pipes therein" from the granted premises to a certain spring on other land of the grantor, "and the right to take the water of said spring through said trench and pipes on to said granted premises, leaving at all times a sufficient and convenient watering place of fresh water for cattle and other stock near the head of the spring, . . . meaning hereby to convey all the right which I have to the water at and near the head of said spring, except the aforementioned watering place, which is reserved." *Held*, that the deed created an easement in fee for the benefit of and appurtenant to the land conveyed.

Upon the subdivision into building lots of land conveyed by a deed which created also an easement in fee for the benefit of and appurtenant to the land, consisting of the right to take the water of a spring, each lot has an interest in the easement, and neither mere non-user nor the use upon the land of water from the city water supply will extinguish the easement.

If a deed of land creates also an easement in fee for the benefit of and appurtenant to the land, consisting of the right to take the water of a spring, a deed, made after the land had been subdivided into building lots by an owner of a part of the land, of the right to take the water of the spring cannot extinguish the easement, nor give to his grantee a right as to an easement in gross; nor can the words "leaving at all times a sufficient and convenient watering place of fresh water for cattle and other stock," in the original deed, whether a reservation for the grantor's life or an exception, avail such grantee, who cannot maintain a bill in equity to restrain a grantee of the land on which the spring is located from interference with the same.

BILL IN EQUITY, filed April 27, 1897, in the Superior Court, to restrain the defendant from using water of a certain spring situated on his land, and called Oak-tree Spring, and from interfering in any way with the plaintiff's rights in the spring. On November 2, 1897, the plaintiff filed by leave of court a supplemental bill, setting up additional rights which he claimed to have acquired to take and use the water of the spring.

Hearing before *Sheldon*, J., who reported the case for the determination of this court, in substance as follows. Prior to September 15, 1857, David Richmond, under whom both parties claimed, was the owner of two large tracts of land, one of about a hundred acres on the easterly side, and the other of about

fifteen acres on the westerly side of Church Street in North Adams. Upon the first tract, and about one fourth of a mile from the other tract, was the spring of water in question. In September, 1857, Richmond conveyed in fee to Edward P. Hunt the second or westerly tract, by a deed containing the following clause: "Also conveying the right to a trench or ditch, and to lay pipes therein, from the aforegranted premises to the Oak-tree Spring (so called) in said Richmond's pasture, and the right to take the water of said spring through said trench and pipes on to said granted premises, leaving at all times a sufficient and convenient watering place of fresh water for cattle and other stock near the head of the spring. Also the right to go upon said Richmond's land, in a prudent and careful manner, to construct and repair said pipes and ditch when necessary, and to do in the same manner such other things as necessarily appertain to the occupancy of said rights and privileges; meaning hereby to convey all the right which I have to the water at and near the head of said spring, except the aforementioned watering place, which is reserved, and all the right which I have to take the same across the public highway; the ditches to be all filled except in the wet land, where they may be left open to concentrate the water. After said pipes are once located and laid, their location shall be and remain permanent."

This land and the rights to the water passed by several mesne conveyances, under the same description, to William S. Blackington, who, by deed dated March 22, 1875, conveyed the same, under the same description, to Franklin R. Blackington. The latter had the land plotted into building lots and placed on the market about 1887, and shortly after some lots were sold and houses built, and these houses were supplied with water by the city of North Adams.

On June 19, 1889, Franklin R. Blackington made a deed to John L. Scott, under whom the plaintiff claims the right to the water of the spring. The description in that deed is as follows: "The right to take and carry away the water of a certain spring, known as the Oak-tree Spring, situated on a certain parcel of land" (being the land now owned by the defendant) "with the right to enter upon said premises for the purpose of taking said water; and also all the privileges pertaining to said spring and

water therein conveyed to me," which were the same privileges mentioned in the deed of Richmond to Hunt.

No land was conveyed by this deed, and neither Scott nor the plaintiff ever owned any part of the tract of fifteen acres conveyed by Richmond to Hunt and afterwards owned by Blackington; but Scott was then the owner of certain land, being a part of the easterly or larger tract formerly owned by Richmond; and this is the same land now owned by the plaintiff, having been conveyed to him by the heirs of Scott on or about April 1, 1893, together with the rights to the spring obtained by the deed from Blackington to Scott. This land had appurtenant to it no right to the water of the spring.

On May 9, 1866, Richmond conveyed to Jerome B. Jackson and another by warranty deed all the land on the east side of Church Street, being Richmond's larger tract above mentioned; and immediately following the description of the land was the clause, "excepting out of the above bounded premises the Oak-tree Spring and privileges therewith conveyed by said Richmond to Edward P. Hunt."

On November 1, 1866, Jackson conveyed to William Martin the same premises by warranty deed containing the following clauses: "being the same premises as conveyed to us by David Richmond and wife by deed dated March 9th, 1866. Excepting and reserving the same rights and privileges as therein mentioned, reference being had to said deed for the same."

On February 1, 1869, Martin conveyed this land by warranty deed to Eli T. Clark, without any mention of any right in the spring, or any rights connected therewith, belonging to other persons.

On November 6, 1872, Clark and Frank Davis, who had become a joint owner, conveyed in fee to Martin by quitclaim deed the following: "all our right, title, and interest in and unto a spring called the Oak-tree Spring, located about twelve rods north of Bradley Street, and about one rod west of land owned by Edwin Thayer; it is the same spring conveyed by said Martin to F. F. Colgrove, and we the said grantors remise, release, and quitclaim unto said grantee the right to lay pipes to said spring across our lands to Church Street and Bradley Street, and also the right to build a suitable reservoir for the

purpose of taking said water, and locate the same on our land." The plaintiff, by deed of the heirs of Martin, now deceased, dated October 28, 1897, purchased the same premises conveyed and described in the deed of Clark and Davis to Martin, and obtained thereby all the rights conveyed to Martin by Clark and Davis, which are the newly acquired rights mentioned in the plaintiff's supplemental bill.

On January 15, 1874, Clark sold and conveyed to Sylvester A. Kemp the land on which the spring was situated, containing some eighteen acres, and being the land now owned by the defendant. In this deed are these words: "Excepting and reserving out of the above conveyance all the rights heretofore conveyed by myself and Frank Davis to William Martin, his heirs and assigns, to lay aqueduct and to take water from a certain spring on said land; for a particular description of which rights, reference may be had to the deed of myself and said Davis to said Martin. Also excepting and reserving out of the above conveyance all the rights in and to the said spring, laying aqueduct, and taking water therefrom, which were conveyed by deed of said William Martin to William S. Blackington, his heirs and assigns, for a more particular description of which rights reference may be had to the deed of said Martin to said Blackington." On August 21, 1896, Kemp conveyed to the defendant the same land by warranty deed, which contained the following: "The said premises are free from all encumbrances, except a right which the heirs of William Blackington have to take water from a spring on said premises, and a like possible right in the heirs of William Martin."

It was proved at the trial that there was no water for domestic use on the lands conveyed to Hunt when conveyed to him; that the water of the spring had never been conducted to such lands, but the town water was conducted to that property in about the year 1887; that by the deeds hereinbefore referred to, the plaintiff was the owner of a portion of the first tract of land as set forth in the bill, but never owned any of the westerly tract; and that the plaintiff had never actually used, but proposed to use the water of the spring on that land and elsewhere. It was in evidence that the plaintiff owned five building lots and buildings on them, situated on the west side of Church Street and south-

erly from Bradley Street; that the land from this spring slopes westerly and southerly toward Bradley and Church Streets, and that David Richmond died on September 24, 1869.

The defendant's evidence showed that he found the spring as a small hole in the ground, with not a large amount of water in it running to waste, spreading out over the ground; that he enlarged it and built a curb around it of stone laid in cement, some six feet in diameter and four or five feet high, and put a cover over it to keep the water pure, and to prevent others from meddling with it; that at the time the bill was brought he had made no use of the water, but afterward did conduct some of it through a pipe to two houses on the same land; that the plaintiff had not theretofore made any use of the water; and that, if the defendant had not used it, it would then have gone to waste.

The judge found that the curb and building put around the spring and roof over it were reasonable acts for the preservation of the spring, and were not injurious to any of the plaintiff's rights; that the defendant was drawing the water away from the spring in pipes for his own domestic use, and this was detrimental to the plaintiff's intended use; and that the plaintiff, if entitled to relief under either his original bill or his supplemental bill, was entitled to nominal damages of one dollar for the injury already done.

The plaintiff claimed to recover under his original bill, on the ground that the right or easement which he claimed in and to the spring was created as an easement appurtenant to the land conveyed by the deed of Richmond to Hunt, which land and easement finally came to Franklin R. Blackington; and that by the deed of Blackington to Scott this easement vested in Scott as an easement in gross, and passed to the plaintiff by the deed of Scott's heirs to him. The plaintiff also contended under his supplemental bill that his other title was created by Richmond's having reserved to himself in his deed to Hunt a right to a watering place, which right, he contended, passed by Jackson's deed to Martin, then to Clark and Davis, and finally by the deed of Clark and Davis again to Martin, and by the deed of Martin's heirs to the plaintiff, of October 28, 1897, vested in the plaintiff; and that if the effect of the deed from Blackington to Scott was not to transfer to Scott as an easement in gross the right or ease-

ment to the spring formerly appurtenant to the Blackington land, but to extinguish that easement, then the plaintiff contended that this second title of his became by such extinguishment an exclusive right to the whole spring with the right to build a reservoir and lay additional pipes.

The defendant admitted that, if the plaintiff had an exclusive right to take the waters of the spring, he had interfered with that right; and contended that the water of the Oak-tree Spring was annexed as a permanent easement to the land conveyed to Hunt; that it could not be separated from it or used at any other place, and Scott took nothing by the deed of F. R. Blackington to him; that the watering place or drinking place reserved in the deed of Richmond to Hunt was limited to the life of Richmond for want of the word "heirs" in the reservation; that even if this was not so, the Oak-tree Spring was expressly excepted in the deed of Richmond to Jackson and in the deed of Jackson to Martin, and no right to the spring passed by the deed of Martin to Clark and to his grantees, so that the plaintiff got no right to the spring by the deed of Martin's heirs; that the bill could not be maintained on the evidence; and that the plaintiff had an adequate remedy at law, and the damage shown did not entitle him to relief in equity.

The judge ruled that the plaintiff, if otherwise entitled to maintain his bill, had not an adequate remedy at law. Such decree was to be entered as justice and equity might require.

E. M. Wood, (*E. H. Beer* with him,) for the plaintiff.

A. Potter, for the defendant.

BARKER, J. The deed of Richmond to Hunt created an easement in fee for the benefit of and appurtenant to fifteen acres conveyed to Hunt. *Hogan v. Barry*, 143 Mass. 538. Upon the subdivision of the fifteen acres into building lots, each lot had an interest in the easement. *Durkin v. Cobleigh*, 156 Mass. 108, 111, and cases cited. As the easement was created by grant, neither mere non-user nor the use upon the fifteen-acre tract of water from the city water supply extinguished the easement, and the deed of June 19, 1889, made by an owner merely of part of the land to which the easement was attached and whose interest in the easement was only a right to use it for his part of the fifteen acres, could neither extinguish the easement nor give to his grantee a right as to an easement in gross.

The right of the original grantor to a watering place for cattle and other stock, whether a reservation for the grantor's life or an exception, cannot avail the plaintiff, who does not ask such a watering place, but seeks the aid of the court to compel the defendant to allow him to carry away for household purposes water, the right to which is annexed to lands in which the plaintiff has no interest.

Upon the facts stated in the report, the bill should be dismissed, with costs. *So ordered.*

WILLIAM C. SPAULDING, receiver, vs. GEORGE S. KENDRICK
& another.

Berkshire. September 13, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Receiving Money in Good Faith in Payment of or as Security for an
Existing Debt.*

One in good faith receiving money in payment of or as security for an existing debt is not bound to inquire where the money was obtained.

BILL IN EQUITY, by the receiver of the Stockbridge Savings Bank, to recover the sum of five thousand dollars, the property of the bank, alleged to have been misappropriated by one Frederick A. Hobbs, a former receiver of the bank, who had been removed from his office. Trial in the Superior Court, before Lilley, J., who found for the defendant Kendrick, who alone defended; and the plaintiff alleged exceptions. The facts appear in the opinion.

C. E. Hibbard, for the plaintiff.

J. C. Hammond, for the defendant Kendrick.

KNOWLTON, J. The bill alleges that the sum of five thousand dollars was taken by Hobbs from the funds in his hands as receiver, and sent to William A. Dickinson of Amherst in the form of a draft, and by him delivered to one James I. Cooper, who received it as the attorney of the defendant Kendrick, and turned it over to him. The plaintiff discontinued his suit as

against all the defendants except Kendrick and Hobbs, and Kendrick alone defends. Kendrick and one Stockbridge were sureties for Hobbs upon a bond given by him as trustee under the will of one Dickinson, in the sum of eight thousand dollars, and previously to the receipt of the money Kendrick had filed a petition in the Probate Court asking to be relieved from further liability on the bond.

We may assume upon the evidence that the money belonged to the bank, and was misappropriated by Hobbs. There was evidence to warrant the finding of the judge, that the defendant Kendrick had no knowledge that the money was other than the property of Hobbs, and that he received it through his attorney in good faith, and as security for a liability of greater amount than five thousand dollars, and on account thereof forbore to prosecute his petition for relief as surety on the bond of Hobbs. The evidence warranted a finding that his receipt of it was the same in legal effect as if it had been put into his possession by Hobbs with his own hand, to be held as security against loss as surety on the bond. The evidence tended to show that the draft was sent to Mr. Dickinson to be held and used as such security, and that, if the delivery of it to Mr. Cooper was not expressly authorized by Hobbs, it was within the general purpose of Hobbs, and was soon afterwards known to him and ratified by him.

The law of the case is settled by numerous decisions. If a thief gives stolen money, or negotiable securities before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or securities as belonging to him, the creditor can hold the property as against the true owner. As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, should carry on its face its own credentials. *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397. *Lime Rock Bank v. Plimpton*, 17 Pick. 159. *Greenfield School District v. First National Bank*, 102 Mass. 174. *Thacher*

v. *Pray*, 113 Mass. 291. *Ex parte Apsey*, 3 Bro. C. C. 265. *Jaques v. Marquand*, 6 Cowen, 497. *Dunlap v. Limes*, 49 Iowa, 177. See also *Mason v. Waite*, 17 Mass. 560, 563; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488. It has often been decided in this Commonwealth that a pre-existing debt is a valuable consideration for a payment made or a security given on account of it. *Blanchard v. Stevens*, 3 Cush. 162. *Fisher v. Fisher*, 98 Mass. 303. *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, 199. *Merchants' National Bank v. Haverhill Iron Works*, 159 Mass. 158. *National Revere Bank v. Morse*, 163 Mass. 383.

Exceptions overruled.

COTSWORTH P. OLDS vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Franklin. September 20, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Railroad — Action.

A person who, while a passenger on a train running upon a branch line of a railroad about ten miles in length, and consisting of freight cars and a combination car in which he is riding, one part of which is designed for passengers and another part for baggage, is injured by such jerking and jolting of the car as is ordinarily incident to a train of this kind, and who is familiar with the nature of the business on this line and the manner of conducting it, cannot maintain an action against the railroad corporation for his injury.

TORT, for personal injuries sustained by the plaintiff while a passenger on the defendant's railroad. Trial in the Superior Court, without a jury, before *Richardson, J.*, who, by agreement of the parties, reported the case for the determination of this court, in substance as follows.

The accident occurred on a branch line of the defendant's railroad, about ten miles in length, extending from South Deerfield to Turner's Falls in the town of Montague.

The plaintiff, who was about seventy years old and in good health for his age, on the day of the accident bought a ticket

entitling him to conveyance as a passenger from South Deerfield to Turner's Falls, and took one of the regular morning trains for the journey. This train was made up, in the manner usual on this branch line, of freight cars and a car known as a combination car, one part of which was fitted with seats for the conveyance of passengers and another part was adapted to carrying baggage.

The train stopped at the passenger station at Turner's Falls, and all passengers had an opportunity to get out. The station is situated about three fourths of a mile from the business centre, where the plaintiff was going for purposes of trade, and the defendant's track extends from the station into the business portion of Turner's Falls and a little beyond, to a locality where the defendant has an engine-house and turn-table. It had been the custom of the defendant to carry, without any additional charge, such passengers as chose to remain on its trains to a place known as the "Cutlery Steps," in the business part of Turner's Falls, and there to stop and give them an opportunity to leave the train.

The plaintiff, on the day of the accident, had the usual opportunity to leave the train at the regular passenger station, but he preferred, for convenience and to save walking the distance of three fourths of a mile to the business portion of the town and carrying a bundle which he had with him, to ride on the train to the Cutlery Steps, and he waited a few minutes while the car was at the passenger station until some shifting of the freight cars in the train had been done. The train, as it left the passenger station at Turner's Falls, was made up of the combination car and one freight car ahead of the engine and three freight cars behind the engine, and it proceeded in the same order, and at the time of the accident was unchanged in its arrangement.

The conductor was with the train until within about an eighth of a mile of the Cutlery Steps, when he stepped off without stopping the train and proceeded to attend to his work elsewhere. The engineer did not get word to stop the train at the Cutlery Steps, and did not know there was a passenger on board. As the train approached the Cutlery Steps, the brakeman on the combination car applied the brake on that car, as he expected the train would stop there, and the plaintiff arose from his seat,

and with his hand upon some part of the car near the door, waited for the train to stop; but it did not stop. The brakeman on the combination car then signalled the engineer to stop the train. The engineer applied the air brake on the engine, and "stopped the train as quick as the brake would hold," as he testified. The brakemen on the freight cars applied the brakes on those cars, and the train was stopped at a road crossing the track about four hundred and thirty feet from the Cutlery Steps. The trainmen testified that, at the time the signal to stop was given, the train was going at the rate of about three miles an hour; but the plaintiff testified that it was going faster; and in stopping, the link and pin coupling, which was used in the make up of the train, allowed the cars to come together in a jerking and jolting manner, which caused the plaintiff to be jerked backward and forward and thrown against some part of the car, and he received the injuries complained of.

The plaintiff had travelled over this branch line many times. He knew that the trains running on the branch were made up of a passenger car and freight cars; that at the time that he was riding from the passenger station to the Cutlery Steps the train consisted of a passenger car and freight cars; and that Turner's Falls was the end of the line. The conductor knew him, and that the business portion of Turner's Falls was his destination.

The judge found that the jerking and jolting were greater and more severe than would occur on an ordinary passenger train run under due care; and ruled that, if the liability in respect to preventing injury by jolting and jerking and stopping suddenly is the same, and if the obligations are the same in all these respects on a freight or mixed train, such as this train was, as on an ordinary passenger train, the plaintiff was entitled to recover; but if the defendant was not liable for such jolting and jerking as were ordinarily incident to a train of this kind, the plaintiff was not entitled to recover; and found for the defendant. If the ruling was correct, judgment was to be entered on the finding for the defendant; but if the defendant was under the same obligations to the plaintiff as it would have been if the train had been an ordinary passenger train run with due care, judgment was to be entered for the plaintiff in the sum of \$350.

P. D. Martin, for the plaintiff.

D. Malone, for the defendant.

KNOWLTON, J. The judge found that the jerking and jolting were "greater and more severe than would occur on an ordinary passenger train run under due care; and ruled that if the liability in respect to preventing injury by jolting and jerking and stopping suddenly is the same, and if the obligations are the same in all these respects on a freight or mixed train, such as this train was, as on an ordinary passenger train, the plaintiff is entitled to recover; . . . but if the defendant was not liable for such jolting and jerking as were ordinarily incident to a train of this kind, . . . the plaintiff was not entitled to recover." By agreement of the parties the case was reported to this court. If the ruling was correct, judgment is to be entered for the defendant; if incorrect, for the plaintiff. On the findings of fact, it must be assumed that this is the only disputed proposition of law which was considered at the trial.

The accident occurred on a branch line of the defendant's railroad about ten miles in length, extending from South Deerfield to Turner's Falls in the town of Montague. The trains running on this branch of the railroad are usually made up of freight cars and a car known as a combination car, one part of which is fitted with seats for the conveyance of passengers and another part is adapted to carrying baggage. It is reasonably to be inferred that there is not sufficient business over this part of the railroad to warrant the running of trains for carrying passengers only. If under these circumstances the defendant was legally bound to provide for the plaintiff at the place of the accident a train made up of passenger cars only, or to conduct its business in such a way as to start and stop its trains with no more jerking or jolting than is common in running ordinary passenger trains, the defendant is liable; otherwise it is not.

The nature of the defendant's business on this line, and the mode of conducting it, were well known to the plaintiff, and he must be assumed to have made his contract for carriage in reference to existing conditions. It is obvious that common carriers must adapt their vehicles and methods to the business to be done. There is every kind of business to be provided for in different places, from the carrying of thousands of tons of freight and

tens of thousands of passengers per day over a single line, to the maintenance of lines over which only an occasional passenger will pass and a few small articles of merchandise be carried. In some places long passenger trains with the best possible equipment for safety and comfort are reasonably required; in others a single horse and a cheap wagon are all that can be maintained from the income of the business for which provision is to be made, and all that reasonably can be expected. It is the duty of a carrier of passengers to exercise "the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business." *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207, 218. If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains. The law is clearly expressed in *Chicago & Alton Railroad v. Arnol*, 144 Ill. 261, 270, as follows: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all of the ordinary inconveniences, delays, and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. . . . But if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in travelling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from the negligence or want of proper care of those in charge of it." Principles decisive of the present case are stated in

Le Barron v. East Boston Ferry, 11 Allen, 312, and in *Heyward v. Boston & Albany Railroad*, 169 Mass. 466. See also *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207, 218; *Illinois Central Railroad v. Azley*, 47 Ill. App. 807; *Dunn v. Grand Trunk Railway*, 58 Maine, 187, 197; *Lusby v. Atchison, Topeka, & Santa Fe Railway*, 41 Fed. Rep. 181, 184; *Ohio & Mississippi Railway v. Dickerson*, 59 Ind. 817.

The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them.

We have no occasion to consider the additional fact that the plaintiff was injured on a part of the railroad which was designed exclusively for freight traffic, beyond the terminus of the line intended for passengers also. There are additional reasons for holding that, when the plaintiff went beyond the passenger station over a portion of the freight tracks, where he and other passengers were permitted to ride for their convenience as a favor, he assumed all the risks incident to the ordinary management of a freight train in that place.

Judgment on the finding.

CAROLINA A. COLLINS, administratrix, vs. INHABITANTS
OF GREENFIELD.

Franklin. September 27, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Loss of Life — Master and Servant — Negligence — Town — Voluntary
Performance of Work incumbent on Another — Evidence.*

In an action under the employers' liability act, St. 1887, c. 270, against a town for causing the death of A. while employed in raking stones down a hillside upon land belonging to the town that they might be gathered and broken up in a stone crusher for use in macadamizing its streets, it appeared that above A. was a large overhanging rock which looked safe from where he was at work, but

which had a large crack behind it caused by blasting done two days before; and that this rock fell a few minutes after A. went to work and crushed him. There was evidence that the defendant's superintendent put A. to work where he was hurt; that the former had been told that the rock which fell upon A. could and ought to be barred down without further blasting; and that he had said that he would see to it. *Held*, that the jury might have found that there was a concealed danger of which the defendant had notice, but which A. did not know and had no chance to find out, and of which he did not take the risk.

If a town does the work of macadamizing a street, which it is the duty of a street railway company to do, under an arrangement with the company by which the latter is to pay for the work, and also sells a small amount of the crushed stone to private persons, in an action against the town for causing the death of A. while employed by the town in the work, the jury are warranted in finding that the town did the work voluntarily as a private enterprise and not under statutory compulsion, and that the superintendent of streets, who had charge of the work, was acting as the agent of the town; and it is immaterial whether the undertaking proved profitable, and evidence on that point is properly excluded.

If a town, from private motives, undertakes a work which actually it might have left to be done by another, and employs A. to aid it in that work, it will be liable for A.'s death caused by the negligence of its superintendent.

It cannot be said, in an action for causing the death of A. while in the defendant's employ, that the exclusion of a portion of an answer in the deposition of the defendant's superintendent, to the effect that he cautioned A. about the dangers of the work, was wrong.

TORT, under the employers' liability act, St. 1887, c. 270, by the administratrix of the estate of Michael Collins, for causing his death. At the trial in the Superior Court, before *Richardson, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

D. Malone, for the defendant.

W. Hamilton, (*W. H. Brooks* with him,) for the plaintiff.

HOLMES, J. This is an action for injuries suffered by the plaintiff's intestate, Michael Collins, which caused his death while in the defendant's employ. The case is here on exceptions to a refusal to direct a verdict for the defendant, and to one or two less important rulings. Collins was engaged in raking stones down a hillside upon land belonging to the defendant, that they might be gathered and broken up in a stone crusher for use in macadamizing the defendant's streets. Above him was a large overhanging rock, which looked safe from where he was at work, but which had a large crack behind it, perhaps in consequence of some blasting done two days before. This rock fell a few minutes after Collins went to work, and crushed him. There was evidence that the superintendent, one Wait, put Collins to

work where he was hurt, that Wait had been told that the rock which fell upon Collins ought to be barred down without further blasting, and that Wait had said that he would see to it.

The facts stated thus far are all that are material to the argument that Collins took the risk of the rock falling, which is one of the grounds on which the main exception is supported. The jury might have found that there was a special and concealed danger of which the defendant had notice, but which Collins did not know and had no chance to find out, and that therefore Collins was not negligent, or did not take the risk, whichever phrase be preferred. *Burgess v. Davis Sulphur Ore Co.* 165 Mass. 71. *McKee v. Tourtellotte*, 167 Mass. 69.

Another ground on which the defendant claims immunity is that the work was under the charge of a public officer, the superintendent of streets. *Clark v. Easton*, 146 Mass. 43. *Pratt v. Weymouth*, 147 Mass. 245. *Prince v. Lynn*, 149 Mass. 193. *Hennessey v. New Bedford*, 153 Mass. 260. *McCann v. Waltham*, 163 Mass. 344. *Jensen v. Waltham*, 166 Mass. 344. *Taggart v. Fall River*, 170 Mass. 325. *Mahoney v. Boston*, 171 Mass. 427. We assume for the purposes of decision that the superintendent was appointed properly, and held his office lawfully as well as *de facto*. *Clark v. Easton*, 146 Mass. 43, 45, 46. We assume also that there was no such control exercised by the selectmen as to make the town liable on the ground of their interference. But the jury were warranted in finding that the work which Collins was doing was in aid of macadamizing a particular street, Federal Street, and this was work which primarily it was the duty of a street railway company to do under Pub. Sts. c. 113, § 32, at least for the most part, and so far as it went beyond the eighteen inches on the sides of the track, according to the exceptions was the duty of the same company by the conditions of the location of its franchise. The town did the work in pursuance of an arrangement with the railway company by which the railway company was to pay and did pay it "the portion of the expense belonging to" the company. It would seem from this language, quoted from the town vote and from the report of the selectmen, that the company did not pay the whole bill; but we must assume, from the statement in the exceptions previously quoted, that the body of the work was what the company

was bound to do. The town also sold a small amount of the crushed stone to private persons.

On these facts the jury were warranted in finding that the town, whatever its public duty as to a portion of the street, did the work voluntarily as a private enterprise, and not under the compulsion of statute, when it might have left it all to the railway company as a duty which the company had assumed. The jury might have found further, as they naturally would if they took the first step, that the superintendent of streets was acting, not as an independent public officer, but for the time being as the agent of the town. The question is not whether the town could modify its duty to the public by a private arrangement, or by the terms of its grant to the railway company alone, as matter of law, as may happen in some cases, for instance, that of landlord and tenant, (*Quinn v. Crimmings*, 171 Mass. 255,) but whether, as matter of fact, the town from private motives undertook a work which actually it might have left to be done by another, and employed Collins to aid it in that voluntary task. If the jury took this view of the facts, the town was liable for Collins's death. *Deane v. Randolph*, 132 Mass. 475. *Sullivan v. Holyoke*, 185 Mass. 273. *Waldron v. Haverhill*, 143 Mass. 582. *Neff v. Wellesley*, 148 Mass. 487.

It is not material whether the undertaking proved profitable, and evidence on that point properly was excluded. The fact that the town made some small sales of crushed stone was a circumstance to be considered, and although taken alone it might not have made out a case, yet, as it was only a portion of the evidence, the judge was not required to rule to that effect, and thus to break one by one the sticks which were relied on only when bound together in a fagot. *Whitford v. Southbridge*, 119 Mass. 564, 575.

A portion of an answer in the deposition of Wait, the superintendent, to the effect that he cautioned Collins about the dangers of the work, was excluded, no doubt on the ground that it undertook to give the effect of what was said rather than the substance of the words which he used. See *Ives v. Hamlin*, 5 Cush. 534. Possibly a part of the excluded testimony might have admitted a more liberal construction, but we are not prepared to say that the judge was wrong

Exceptions overruled.

MARY N. WALKER vs. MYRON P. WALKER.

Hampshire. September 27, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Divorce — Husband's Adultery — Desertion.

A husband cannot set up the wife's desertion in bar of her libel for his adultery committed before her desertion had continued so long as to give him a right to a divorce.

LIBEL, filed November 12, 1896, for divorce on the ground of adultery alleged to have been committed at various times and places in Springfield between April 15, 1892, and September 27, 1896. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions in substance as follows.

It appeared that the parties were married in 1878, and lived together until November, 1890, when the libellant took possession of a large amount of property deposited in New York, and claimed that it belonged to her absolutely; that the libellee, who at that time was living with her in New York, remained there until early in the year 1891, when he went to their country house in Belchertown, where he remained until about June 1, 1891; that a correspondence having been carried on relating to the family affairs, on May 28, 1891, he called her attention in a letter to the relations that existed between them growing out of her action in taking the property, and asked her to tell him what she intended to do in the future; that she answered early in June by stating that he was laboring under erroneous notions concerning her sentiments towards him; that soon after, in June, she went to Belchertown, and thereupon he went to Springfield and remained there; that upon June 19, 1891, she wrote him a letter asking him to return and forget the past, and proposing that they live together; that he at once acquiesced, and went to Belchertown, where he remained for about a month, and then, while absent, his wife went to New York to her apartments, and since that time the parties have not lived together; that thereafter, correspondence took place, he urging

her to live in Massachusetts with him, and she replying on December 15, 1891, in the following letter :

“ I will answer your questions to the best of my ability, if that will help to straighten matters between us.

“ First, it is my wish that you and I, and such of my children as I desire to have with me, shall live together as a family, always excepting the one thing which you voluntarily gave up some six years ago.

“ Second, to live in any place which your business interests may require ; I should prefer not to live in Springfield, because I know that the climate there has been harmful to Kate, and would be to me ; best of all, I should like New York, which agrees so well with us both, in health and pleasure. If you find any business opening which meets with my approval, you may put into it the \$25,000 which you now have in your possession, from the sale of the stable, as your capital in business. I shall expect you to abandon all idea of politics for the future, to engage in some genuine business, with an eye to that alone, not asking me to move to such place until you are settled in such business with a fair prospect of being and satisfied with it, and of making it reasonably profitable ; meanwhile doing as you did for three years, when you wished to be in Boston, i. e. come down here to spend Sundays with us, and as much oftener as you may find it agreeable and convenient.

“ Third, I should wish the life insurance policies, which have been kept up so many years, to be realized on for my benefit.

“ That you guarantee me in writing my sole ownership and absolute control of all my property, real and personal.”

It appeared that he answered the same by letter dated December 25, 1891, declining to accede to her terms ; that he wrote her again on April 14, 1892, offering her a home in Springfield, to which she made no reply in a letter which she wrote to him on the 19th ; that she ceased to live with him after going to New York in September, 1891 ; and that at the time when he returned to live with her after the letter of June 19, 1891, she declined any marital relations, and insisted upon such declination ever since.

She testified that she did not intend to bring a libel on the ground of adultery until shortly before the same was filed, and

that, on account of some controversy arising about the property, she was informed about it, although she had heard rumors in 1893, but had attached no importance to them. The evidence of the libellant tended to show that the libellee had committed acts of adultery as early as the year 1892.

The libellee requested the judge to make certain rulings, the nature of which appears in the opinion. The judge declined so to do, found that the libellant had not deserted the libellee, that his offer of a home in Springfield was not made in good faith, and ordered a decree of divorce *nisi* to be entered against the libellee for adultery. The libellee alleged exceptions.

E. C. Bumpus, for the libellee.

E. H. Lathrop, for the libellant.

BARKER, J. If, as the libellee contends, the letter of the libellant to him of December 15, 1891, with her subsequent conduct until he committed adultery in the year 1892, was a desertion which if continued for three years would have given him ground for divorce, the libellant yet had a *locus penitentiæ*, and under our decisions, after the adultery of the libellee, was under no obligation to return to him, and he cannot set up the desertion in bar of her libel for his adultery committed before her desertion had continued so long as to give him a right to a divorce. *Hall v. Hall*, 4 Allen, 39, 41. *Clapp v. Clapp*, 97 Mass. 531. See also *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386, 389; *Morrison v. Morrison*, 142 Mass. 361; *Watts v. Watts*, 160 Mass. 464, 467. *Exceptions overruled.*

PATRICK BESTON & another vs. FRANCES A. AMADON.

Hampden. September 28, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Contract — Married Woman — Agency — Estoppel — Promissory Note.

In an action to recover the price of bricks used in erecting a building upon land of the defendant, it appeared that the bricks were ordered by the defendant's son in law, and that the defendant, her husband, her daughter, and her son in law

lived together on the place where the building was put up. There was evidence that the son in law hired the farm under an oral arrangement, but this was denied by the plaintiff. In April or May the son in law began building, having conveyed his personal property on the place to the defendant in January, and he went into insolvency in November, soon after the work was finished. The value of the work done was estimated by the plaintiff, an expert, at from ten to twelve thousand dollars. There was evidence that the defendant knew of the work while it was going on, and it was not disputed that some painting on the place was paid for by the defendant's husband, who was her general agent, with her money. *Held*, that, while the defendant introduced evidence tending the other way, the jury would be warranted in finding that the building was ordered by the defendant's authority.

The fact that a vendor took the note of a certain person when he supposed that he was dealing with him alone is not a bar to an action against a third person for the price of the merchandise, the note having been offered back.

CONTRACT, to recover the price of bricks used in building a greenhouse on land of the defendant. Trial in the Superior Court, before *Bond, J.*, who directed the jury to return a verdict for the defendant; and the plaintiffs alleged exceptions. The facts appear in the opinion.

J. B. Carroll & W. H. McClintock, (J. F. Stapleton, Jr. with them,) for the plaintiffs.

W. W. McClench, for the defendant.

HOLMES, J. The bricks were ordered by one Cartter, the defendant's son in law. At the trial a verdict was directed for the defendant, we presume on the ground that there was no evidence that the defendant's son in law was her agent.

The defendant, her husband, her daughter, and her son in law lived together on the place where the greenhouse was put up. The defendant's evidence was that Cartter hired the farm at fifty dollars a month under some oral arrangement, but even this precarious tenure seems not to have been admitted by the plaintiffs. In April or May, 1895, Cartter began the greenhouse, having conveyed pretty much all the personal property which he used upon the place to the defendant in January, and going into insolvency in November, soon after the work was finished. The value of the work done that summer was estimated by the plaintiff, an expert, at from \$10,000 to \$12,000. There was evidence that the defendant knew of the work while it was going on, and it was not disputed that some painting on the place was paid for by the defendant's husband, who was her general agent, with her money. We are of opinion that on these

facts the jury would have been warranted in finding that the building was ordered by the defendant's authority. It is true that the defendant introduced evidence which tended the other way, but the jury might have preferred to disbelieve it rather than to suppose that the order was given by Cartter on his own behalf alone under circumstances where it would have looked very much like a deliberate fraud. In most of the cases like this which have been cited for the plaintiffs, the order was given by the husband of the owner of the place, and in some, not all, there was evidence that he was the general agent or manager for his wife. *Gannon v. Shepard*, 156 Mass. 355. *Dyer v. Swift*, 154 Mass. 159. *Jefferds v. Alvard*, 151 Mass. 94. *Wheaton v. Trimble*, 145 Mass. 345. *Arnold v. Spurr*, 130 Mass. 347. *Lovell v. Williams*, 125 Mass. 489. But in *Westgate v. Munroe*, 100 Mass. 227, the report of the judge stated that there was no evidence tending to show who employed or procured the services of the plaintiffs in making the repairs, yet the court, speaking through Mr. Justice Hoar, said that they entertained "no doubt that if a person, with the knowledge of the owner, performs valuable services upon the separate property of a married woman, it is evidence of an employment by her, and may authorize a jury to find a contract by her to pay for it." If in addition to the evidence in that case the name of a member of the household had been given as that of the person who gave the order, plainly it would not have changed the opinion of the court, nor could the result be affected if he and the alleged principal should unite in denying that he acted on the defendant's behalf. The jury might disbelieve their testimony, and draw the same inference that they would have had a right to draw if the interested evidence had not been given. *Dyer v. Swift*, and *Jefferds v. Alvard*, *ubi supra*.

It is not argued for the defendant that the fact that the plaintiffs took Cartter's note when they supposed they were dealing with him alone is a bar to this action. The note had been offered back. *Lovell v. Williams*, 125 Mass. 489.

Exceptions sustained.

WALLACE A. PARKER vs. AMENZO GRIFFITH.

Hampden. September 27, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Slander — Truth in Justification — Damages — Exceptions — Evidence of Professional Skill and Ability — Motion for New Trial — Matter within Discretion of Presiding Justice — Question for the Jury — Credibility of Witness.

At the trial of an action for alleged slander in accusing the plaintiff, a physician, of ravishing the defendant's wife, the finding of the jury that the defendant's justification is established makes it unnecessary for them to consider the subject of damages, and hence renders immaterial exceptions to the exclusion of evidence offered by the plaintiff to show his general reputation as a man of skill in his profession, to prove that his practice as a physician was profitable, to prove specific acts and operations performed by him tending to show his professional ability, and to show by his own testimony the diminution of his business since the utterance of the alleged slander by the defendant.

Where upon a motion for a new trial the plaintiff asks the judge to rule that there was error in the instructions which permitted the jury to find for the defendant upon insufficient evidence, and excepts to his refusal so to rule, no exception having been taken to the instructions and the question not having been previously raised, the motion is addressed to the discretion of the court, and a refusal of the judge to grant such request on the hearing of the motion is not a matter of exception; the court adding that, whatever might be thought of the credibility of the principal witness for the defendant, there was enough in her testimony to warrant the judge in submitting to the jury the question decided by their verdict.

TORT, for alleged slander in accusing the plaintiff, a physician, of ravishing the defendant's wife after a surgical operation. The answer was a general denial, and a justification of truth. At the trial in the Superior Court, before *Bond, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

B. S. Parker, for the plaintiff.

T. A. Fitzgibbon, (*S. S. Taft* with him,) for the defendant.

KNOWLTON, J. The only exceptions taken at the trial of this case relate to the exclusion of evidence. The plaintiff offered to show his general reputation as a man of skill in his profession, and to prove that his practice as a physician was profitable, and also to prove specific acts and operations performed by him tending to show his professional ability. He also offered to show by

his own testimony the diminution of his business since the utterance of the alleged slander by the defendant. The presiding justice excluded the testimony.

Upon the question of liability, the issue was whether the words uttered by the defendant were true. It seems clear that the testimony excluded would have had no tendency to show that the plaintiff was not guilty of the crime charged against him in the words set out in the declaration. The only issue upon which it could have had any bearing was the amount of the damages. Some of it was plainly incompetent upon any question in the case. Without deciding whether any part of it properly might have been admitted in connection with other evidence upon the question of damages, it is enough to say that the finding of the jury that the defendant's justification was established made it unnecessary for them to consider the subject of damages, and renders these exceptions immaterial. *Thompson v. Dickinson*, 159 Mass. 210, 212. *Lauler v. Earle*, 5 Allen, 22. *Cunningham v. Parks*, 97 Mass. 172.

Upon a motion for a new trial the plaintiff asked the judge to rule that there was error in the instructions which permitted the jury to find for the defendant upon insufficient evidence, and excepted to his refusal so to rule. No exception had been taken to the instructions, and the question had not previously been raised. A motion for a new trial is addressed to the discretion of the court, and a refusal of the judge to grant such a request on the hearing of such a motion is not a matter of exception. *Kidney v. Richards*, 10 Allen, 419. *Whittaker v. West Boylston*, 97 Mass. 273. *Commonwealth v. Morrison*, 184 Mass. 189.

This is a sufficient answer to the plaintiff's argument. But we may add that, whatever may be thought of the credibility of the principal witness for the defendant, there was enough in her testimony to warrant the judge in submitting to the jury the question decided by their verdict.

Exceptions overruled.

**STEPHEN B. McISAAC vs. NORTHAMPTON ELECTRIC
LIGHTING COMPANY.**

Hampden. September 27, 1898. — October 20, 1898.

Present: **FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.**

*Personal Injuries — Master and Servant — Assumption of Risk — Action
— Evidence.*

An electric lighting corporation owes no duty to the linemen in its employ to inspect, below the surface of the ground, the poles upon which its wires are suspended to see whether they are decayed, but a lineman, when he enters its service, assumes the risk of an old pole breaking and falling when he is working upon it, if he does not take measures to ascertain its condition before going upon it, and he cannot maintain an action against the corporation for personal injuries sustained from that cause; and evidence that the corporation had made no inspection of the pole prior to the accident is immaterial.

In an action against an electric lighting corporation for personal injuries occasioned to the plaintiff, while in its employ as a lineman, by the breaking and falling of a pole on which its wires were suspended, the words, "It is not the lineman's business to do it," are rightly stricken from the answer to the question, "That is so simple a man can do it [inspect a pole] who is about to climb a pole as well as anybody?" and the questions, whether it is a "part of the work of a lineman to make that inspection," and whether linemen "customarily perform that work of inspection," are also rightly excluded.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ as a lineman. Trial in the Superior Court, before *Maynard, J.*, who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

The declaration contained four counts, the first at common law and the last three under the employers' liability act, St. 1887, c. 270.

J. B. Carroll, (W. H. McClintock with him,) for the plaintiff.

W. G. Bassett, for the defendant.

KNOWLTON, J. The plaintiff was employed by the defendant as a lineman, and was injured by the breaking and falling of a pole on which the defendant's wires were suspended. The pole was about forty feet in length, was set in the ground about five

feet, and was about thirty-five feet high. The undisputed evidence tended to show that it was badly decayed a few inches below the surface of the ground, so that it broke off square with the strain upon it resulting from the plaintiff's weight and the force from wires drawing upon it after other wires had been removed, which probably had previously tended to counteract the strain from those that remained. The plaintiff contends that the defendant was guilty of negligence in failing to ascertain whether the pole was sound and strong, or to take other precautions for his safety.

The plaintiff was directed to go and take down from the pole the two wires upon it which belonged to the defendant, and to put them on a new pole near by, which had been erected on account of a change of grade in a railroad at a crossing. He went alone to do the work, using a horse and wagon belonging to the defendant to carry such tools and materials as he thought he needed. He was a man of experience in this kind of business, and the method of doing the work he seems to have determined for himself. The pole was of chestnut wood, about eight inches in diameter at the top, and about fourteen inches at the surface of the ground. It had been set between eight and nine years, and the evidence tended to prove that it showed no weakness or sign of decay above the ground.

A fundamental question is whether the defendant owed to a lineman, whose business it was to work upon poles all along the line as occasion might require, the duty to inspect its poles below the ground, and inform the linemen whenever any of them were so decayed as to be unsafe to work upon.

The plaintiff admitted in his testimony that he knew that the life of a pole was limited, and that any pole after a time would become unsafe. He had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which

a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition before going upon it. All the evidence tends to show that in the ordinary course of the business, the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the poles as to soundness without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon. The plaintiff testified that there were pike poles belonging to the defendant at the shed from which he started with the horse and wagon, and that he was familiar with the use of pike poles in setting new poles and bracing up old ones, and there is nothing to show that he might not have taken some of them to use in the work if he had chosen to.

The burden was upon him to show that the defendant's neglect of some duty caused the accident. We are of opinion that there is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was therefore no evidence of negligence on the part of the defendant.

There was no error in the rulings in regard to the admission of testimony. Evidence that the defendant had made no inspection

of its pole prior to the accident was immaterial, inasmuch as the defendant owed the plaintiff no duty to inspect it.

The words, "It is not the lineman's business to do it," in Dorsey's answer, were rightly stricken out. To say nothing of other objections, they were not responsive to the question.* The question whether it was a "part of the work of a lineman to make that inspection," was properly ruled out. It called for an opinion of the witness in regard to the legal effect of a contract. The question whether linemen "customarily perform that work of inspection" was also immaterial. So far as appeared, it was not the custom of anybody to make such an inspection; but in any case where the apparent age of the pole was such as to make it probable that it was not strong enough to sustain a man working upon it, due care on the part of the lineman would require him to examine it just below the surface of the ground before risking himself upon it.

Our view of the main question makes it unnecessary to consider whether the general duty of the defendant to the plaintiff in regard to the strength of poles on which he was working is affected by the fact that it was not the owner of the pole that broke, but was merely using it in its business under the authority of the owner.

Exceptions overruled.

HELEN R. POMEROY vs. BOSTON AND MAINE RAILROAD.

Hampden. September 28, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Railroad — Negligence — Trial.

If a passenger, while alighting from a railway car at a station, is injured by a sudden movement of the car, which is not explained, and which the jury, in an action for the injury, therefore has a right to attribute to the negligence of the railroad corporation, the defendant is not entitled to successive rulings that there was no evidence of negligence on the part of the several servants of the corporation by some one of whom the movement must have been caused.

If the sudden movement of a railway car, while a passenger is alighting therefrom

* This question was as follows: "That is so simple a man can do it [inspect a pole] who is about to climb a pole as well as anybody?"

at a station, and using due care, is caused by letting off the air in the brake, the railroad corporation may be liable to him for the result of the act, unless there was no way to avoid letting the air off in the manner in which it was let off, although the way adopted was the usual and proper way.

If one party to an action wishes to rely, as showing an admission by the other party, upon testimony referred to by the judge in his charge and used for another purpose, he should call the attention of the judge to it.

TORT, for personal injuries occasioned to the plaintiff, a minor, while alighting from a train on the defendant's railroad. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

A. L. Green, for the plaintiff.

HOLMES, J. This is an action for personal injuries, alleged to have been caused by negligently permitting a car to move suddenly while the plaintiff, a passenger, was alighting from it at a station. At the trial there was evidence that the car moved as alleged, but it did not appear who made it move. Of course the jury, if they believed the story, were at liberty to find that some servant of the company was the cause, probably the brakeman, the conductor, or the engineer. The defendant tried to break the force of this inference by asking successive instructions that upon the pleadings and evidence there could be no recovery by reason of negligence on the part of any one of these persons. As there was no question on the pleadings, this meant, so far as it was not misleading in form, that there was no evidence that the brakeman had been negligent, or the conductor or the engineer. The judge refused to give the instructions asked, and the defendant excepted.

The refusal was clearly right. There was evidence that the injury was caused by some one of the servants described. It was not necessary for the plaintiff to go further, and prove from whose hand the injury came. See *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407. If she showed that the responsibility rested upon one of a group, that being all that she needed to show, rulings exonerating each member of the group successively would be wrong, either on the ground that evidence against the group was some evidence against each member of it, or else upon the ground that they were irrelevant to the evi-

dence offered. This is another attempt to break the sticks of a fagot separately, although of a different kind from that just dealt with in *Collins v. Greenfield, ante*, 78.

The plaintiff testified that the car moved a foot and a half, and there was some evidence tending to show that the motion was caused by letting off the air in the brake in the usual way. The defendant asked a ruling that, if the injury was due to this cause, the plaintiff could not recover. However improbable this account may seem, if the jury found that the defendant let off the air at such a time and in such a way as to throw down a passenger leaving its car and using due care, then, subject to the instructions which were given, they might hold the defendant liable for the result. The judge instructed the jury that, if there was no way to avoid letting the air off in the way in which it was let off, if the way adopted was the usual and proper way, it would not be carelessness. The request for a broader ruling, that there could be no recovery because of any motion imparted to the car by letting off the air brakes, is answered by what we have said. The instructions by the judge upon the same point seem to require no special comment.

Some testimony was put in tending to show that the plaintiff's parents had told a different story out of court. The judge cautioned the jury that the parents' statements were not evidence of the facts stated, but were "used simply for the purpose of affecting the testimony of those parties." This was excepted to, and now it is suggested that a part of the testimony referred to by the judge (not all) was to conversations of the mother in the presence of the child, and that the failure of the child to correct her mother might be found to have been an admission. The form in which the testimony was put in suggested only contradiction of the mother, as nothing was asked or stated concerning the conduct of the child at the interview, and very naturally it did not occur to the judge that any other use was to be made of it. If the counsel for the defendant had thought that he could deduce an admission from the supposed failure of a suffering child of nine or ten in its mother's arms to correct her statement, he was bound to call the attention of the judge to it. Such an inference is not one which the evidence was calculated to suggest.

We have dealt with all the exceptions which were argued. We notice no error elsewhere. *Exceptions overruled.*

THOMAS C. MORRISSEY & another vs. THEODORE GEISEL
& others.

Hampden. September 28, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Contract — Evidence — Vote of Labor Union.

In an action for the breach of an alleged oral contract to employ the plaintiff to erect a building, it appeared that the defendant advertised for bids, stipulating that all labor should be done by union men; that the plaintiff made the lowest bid; and that the parties met on a certain day, when, according to the plaintiff's testimony, the contract was awarded to him; but the defendant testified that he went no further than to say that if the plaintiff could produce to the defendant's satisfaction evidence or a certificate from the labor unions that the plaintiff was acceptable to them, he should have the contract. After this meeting of the parties, a building laborers' union voted that "we refuse to work for any contractor that gets this job that has not had all union men for the last two years." There was evidence that the plaintiff had employed some non-union men within two years; and at another meeting between the parties and some representatives of labor unions, the plaintiff offered to give a bond to employ only union men upon the job. On the next day, at a special meeting of the building laborers' union, it was voted that "we sustain our former action." *Held*, that the two votes were admissible in evidence.

CONTRACT, to recover for the breach of an alleged oral contract to employ the plaintiffs to build a hotel and bottling establishment in Springfield. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the defendants; and the plaintiffs alleged exceptions, which appear in the opinion.

J. B. Carroll & W. H. McClintock, (*J. F. Stapleton, Jr.* with them,) for the plaintiffs.

W. H. Brooks & W. Hamilton, for the defendants.

HOLMES, J. This is an action for the breach of an alleged oral contract to employ the plaintiffs to build a hotel and bottling establishment in Springfield. The defendants advertised for bids, stipulating that all labor should be done by union men. The plaintiffs made the lowest bid. The parties met on the afternoon of March 17, 1896, and, according to the plaintiffs' testimony, the contract was awarded to them. The defendants, on the other hand, testified that they went no further than to

say that, if the plaintiffs could produce to the defendants' satisfaction evidence or a certificate from the labor unions that the plaintiffs were acceptable to them, the plaintiffs should have the contract. The jury found for the defendants.

At the trial several exceptions were taken, some if not all of which, apart from other questions, were made immaterial by the charge of the judge. Only one is insisted upon at the present time, and that is to the admission of two votes by the Building Laborers' International Protective Union, No. 8, of America, otherwise called in the testimony the Masons' Tenders' Union, the Hod Carriers' Union, or the Laborers' Union. These votes were, first, "Moved & Sec that we Refuse to Work for any Contractor that gets this job that has not Had all union men for the last two years, — Carried," passed in the evening of March 17, after the meeting of the parties to this suit about the contract; and, secondly, "A special meeting called for the purpose of asking whether we now recede from our former action in regard to this brewery job or not. Moved and seconded that we sustain our former action. Forty-five for and six against. Carried." Passed on March 21.

There was evidence that the plaintiffs had employed some non-union men within two years, and indeed it is not a violent inference that the first vote was directed against the plaintiffs especially. On March 20, before the second vote, there was a meeting between the plaintiffs, the defendants, and some representatives of labor unions, for the purpose, it might have been found, of trying to arrange matters between the plaintiffs and the laborers. At this meeting the plaintiffs offered to give a bond of five hundred dollars to employ only union men upon the job.

When the votes were put in, it was possible that the plaintiffs might contend that, even if the jury should find that on March 17 the defendants only had made a conditional offer, the plaintiffs had satisfied the condition, reasonably understood, and were able to go on with union labor. The first vote of the Laborers' Union was treated by the parties at their meeting as sufficiently proving that at that time the plaintiffs could not get members of that union to work for them. It proved it very plainly. Such a vote was more than a mere declaration of intention. It was,

or might have been found to import, a command by the union to every one of its members not to work for the plaintiffs, and a command which no member of the union would dare to disobey. The existence of such a command unrevoked, from a superior power, to those whom the plaintiffs would have employed if they could, does not depend upon communication to the plaintiffs for its effect as evidence of what the plaintiffs were able to do with the men. The votes were important also as bearing on the position of the unions from which the defendants required a certificate. They were not only declarations of intention, they were acts, orders carrying out the intention, the second of them seemingly in rejection of the plaintiffs' attempt to conciliate them by a bond. There is no question that they were serious votes. As such, whether communicated or not, they showed that the plaintiffs were not acceptable to the union that passed them. It is argued that the offer of the bond does not appear to have been communicated to the union. But it was made to their secretary, who was at the meeting of March 20 to represent them. If this was not sufficient, the contents of the second vote show plainly enough that the secretary had laid the offer before the meeting.

It is enough that the evidence was admissible in connection with the rest of the defendants' evidence, and it is unnecessary to consider whether on the plaintiffs' story the votes would have been competent to show that no cause of action had accrued because the plaintiffs were not able to begin work with union men. See *Jones v. Parker*, 163 Mass. 564, 567, 568. The judge took the most favorable view for the plaintiffs, and instructed the jury that, if a contract was made on the 17th, the plaintiffs were entitled at least to nominal damages, and thus absolutely excluded a finding for the defendants on the ground of a breach of condition after the contract was made.

The first vote, at least, was admissible also from another point of view. It was open to the defendants to argue that the meeting of March 20 was more consistent with the defendants' evidence that the contract depended upon the plaintiffs' having come to terms with the labor unions than with the plaintiffs' story. In order to explain the plaintiffs' conduct it was proper to put in the vote which evidently was one of the causes of the meeting.

Exceptions overruled.

GEORGE E. PHELPS, administrator, vs. NEW ENGLAND
RAILROAD COMPANY.

Hampden. September 28, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Loss of Life — Railroad — Grade Crossing — Action — Statute — Law and
Fact — "Gross Negligence."*

In an action against a railroad corporation for causing the death of the plaintiff's intestate at a grade crossing, by failure to give the signals required by Pub. Sts. c. 112, §§ 163, 213, it cannot be ruled, as matter of law, that gross negligence on the part of the plaintiff's intestate was proved, if, while the evidence tended strongly to show that the intestate was negligent, some of the important circumstances bearing on his conduct were in doubt. The jury alone could authoritatively determine them.

The use of the words "gross negligence" in Pub. Sts. c. 112, § 213, shows that the Legislature intended a materially greater degree of negligence than the mere want of ordinary care.

TORT, by the administrator of the estate of Rosetta Phelps, for her death caused by a train at the crossing of Allen Street, a highway at grade, by the defendant's railroad in Springfield. The declaration contained two counts. The first was under Pub. Sts. c. 112, § 213; and the second alleged that the "intestate was struck by one of the locomotives of the defendant, and received severe bodily injury through the negligence of the defendant, who carelessly omitted, while approaching the said highway with its said locomotive, at a high rate of speed, to give any warning, by a flagman or otherwise, or to properly guard said highway by gates, bars, or other contrivances or appliances, and carelessly and negligently failed to give the signals required by law before approaching said crossing; that it was then and there dangerous by reason of the approach of said locomotive; and that by reason of the said injury the life of the plaintiff's intestate was lost."

At the trial in the Superior Court, before *Dewey, J.*, the evidence was conflicting as to whether the signals required by the statute to be given at the approach of the crossing were given, and the jury found, in answer to a question submitted to them, that they were not given. The accident happened at half past seven o'clock on the evening of March 31, 1897, it being cold and dark. The deceased was seventy-one years of age.

One Eliza Merry, who accompanied the deceased, testified that she heard the train at what she supposed to be the Warner Street crossing, which was some distance away, so they started to cross; that, having stepped over the track, she turned and saw the deceased stepping over, when the locomotive which was just on the crossing gave three danger signals and then struck and killed her; that she herself listened for whistle and bell as she crossed, but heard neither; and that the deceased appeared to be confused.

On cross-examination, she testified that she had lived near the track for four years and the deceased for sixteen years, and that they both were familiar with all the trains; that the deceased was in good health, and that her hearing and eyesight were both good, although she wore glasses; that neither she nor the deceased looked or listened to see if the train was coming, stating for herself, "I did n't hear any whistle, so I did n't suppose it was near the crossing"; and that it was possible to see the headlight of the locomotive twenty-five or thirty feet away from the crossing.

Two other witnesses for the plaintiff testified that they heard the signal, but that they took it to be at the Warner Street crossing.

The defendant requested the following rulings: "1. Upon all the evidence, the plaintiff cannot recover under the first count. 2. Upon all the evidence, the plaintiff cannot recover under the second count. 3. If the plaintiff knew that the train was approaching, it is immaterial whether the signals were given or not. 4. If the plaintiff in any way learned before reaching the crossing that the train was approaching, and not being then in danger, undertook to cross the track in front of the train, she was guilty of gross negligence, and cannot recover."

The judge gave the second request, and refused to give the others, except as embraced in his instructions to the jury; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. W. McClench, for the defendant.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

KNOWLTON, J. The only question in this case is whether the judge should have instructed the jury that the plaintiff's intestate

was guilty of gross negligence, and should have directed a verdict for the defendant. Plainly there was no evidence that she was in the exercise of due care, and the jury were therefore rightly instructed to find for the defendant on the second count.

The first count is founded upon the Pub. Sts. c. 112, § 213, under which a railroad corporation is liable if one is injured in person or property, or if the life of a person is lost, at a crossing where signals are required by the Pub. Sts. c. 112, § 163, and where the corporation neglected to give the required signals, and such neglect contributed to the injury, unless it appears that the person was "guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." When a plaintiff's case is made out in other particulars, the burden of proof is on the defendant to establish gross or wilful negligence, or an unlawful act of the person injured, or of some one representing him, which contributed to the injury, if the corporation would escape liability on this ground.

Where there are no binding admissions, and the case must be proved affirmatively by the testimony of witnesses, the court can seldom if ever rule, as matter of law, that a material fact is proved. The question what is established by testimony is ordinarily a question of fact for the jury.

In the present case the evidence tends strongly to show that the plaintiff's intestate was negligent; but some of the important circumstances bearing upon her conduct were in doubt on the evidence, and the jury alone could authoritatively determine them. The defendant sought to prove gross negligence within the meaning of the statute. How much greater is the degree of neglect necessarily existing in gross negligence than that which is always found in negligence that is not gross has never judicially been determined in this Commonwealth. But the use of the words "gross negligence" in the statute shows that the Legislature intended a materially greater degree of negligence than the mere want of ordinary care. *Galbraith v. West End Street Railway*, 165 Mass. 572. *Morey v. Gloucester Street Railway*, 171 Mass. 164.

We cannot say, as matter of law, that gross negligence on the part of the plaintiff's intestate was proved in this case.

Exceptions overruled.

EDWARD E. ALDRICH vs. CHARLES F. ALDRICH, executor,
& others.

Worcester. October 3, 1898. — October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Will — Trust — “Precatory Words.”

A testator gave his entire estate, both real and personal, to his wife absolutely.

After one or two intervening clauses he provided as follows: “I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives.” When the will was made and at the death of the wife, who survived him, they had five children, A. and B., sons, and C., D., and E., daughters. The wife gave by will, after a few small legacies including a pecuniary legacy to A. and one to B. of an equal amount in trust, her entire estate to C., D., and E. *Held*, on a bill in equity by B. to establish a trust under the will of his father, that, taking the will as a whole, it was not the intention of the testator to create a trust.

BILL IN EQUITY, filed May 6, 1898, in the Superior Court, by a son of P. Emory Aldrich, to establish a trust under the will of his father.

The bill alleged that the testator died on March 14, 1895, leaving a will by which he gave “all the rest and residue of my estate, after the payment of debts,” to his wife. After appointing her executrix, and requesting that she be exempt from giving sureties on her bond and be not required to file any schedule of property in the Probate Court, he proceeded, “I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives.” The widow died on December 25, 1897, leaving a will by which she provided, “After the payment of all debts and charges it is my wish so to provide that the remainder of my property may suffice if possible to

maintain the home where we have so long lived happily, for those of my children who may need it, without attempting to control their disposition of it as may to them seem best." After a few small legacies, including one thousand dollars to Charles F. Aldrich, a son, who was named executor, and one thousand dollars to said Charles in trust for the plaintiff, the testatrix further provided, "All the rest, residue, and remainder of my property of every nature, I give, devise, and bequeath to my three daughters, Caroline V. Durant, Henrietta G. Wardwell, and Josephine C. Aldrich, in equal shares, to have and to hold to them their heirs and assigns forever. It is not necessary further to state the reasons for these provisions. My children all know that there is no difference in our affectionate relations, and I know that if occasion arises each one of them is ready to help the others."

These three daughters, the plaintiff, and Charles F. Aldrich are now and were the only children of P. Emory Aldrich and his wife when he made his will. The widow died possessed of the personal property left her by her husband's will, except the income thereof, which she spent during her life. The plaintiff received during the life of the testatrix no part of the testator's property, either real or personal, and the one thousand dollars left to him in trust by the will of the testatrix was less than one fifth of the property owned by her when she made her will, and at her death exclusive of what came to her by the will of her husband, and less than one fifth of the personal property so left by him, and less than one fifth of the value of the real estate left by him. The prayer was that an account might be taken, and that the executor might be directed to hold the property as trustee, and to pay over to the plaintiff one fifth of the same.

Hearing before *Dewey, J.*, who reserved the case for the consideration of this court.

G. S. Taft, for the plaintiff.

C. F. Aldrich & W. B. Durant, for the defendants.

MORTON, J. If the testator had intended to create a trust in favor of his children at his wife's death, there can be no doubt that he knew how to do it in clear and unmistakable terms, and it is almost inconceivable that, if such was his purpose, he

should have expressed himself in the manner in which he has done.

There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it. *Hess v. Singler*, 114 Mass. 56. *Lambe v. Eames*, L. R. 10 Eq. 267; *S. C.* 6 Ch. App. 597.

In the present case there is what clearly would constitute in law, if it stood alone, an absolute gift of the estate to the wife. Then follows, after one or two intervening clauses, the one on which the plaintiff relies. This was intended by the testator, it seems to us, to express his reason for the gift to his wife and his confidence in her, and not to cut down or affect the absolute character of the gift which he had previously made to her. It is true that he says in substance that he expects that the property, when she shall no longer need it, will be divided equally between the children and their representatives. But there is nothing which renders it obligatory on her to do this, and therefore one of the features of a precatory trust is wanting. See *Warner v. Bates*, 98 Mass. 274; *Spooner v. Lovejoy*, 108 Mass. 529; *Hess v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; *Davis v. Mailey*, 134 Mass. 588; *Sturgis v. Paine*, 146 Mass. 354; *Durant v. Smith*, 159 Mass. 229; *Eaton v. Watts*, L. R. 4 Eq. 151; *Lambe v. Eames*, L. R. 10 Eq. 267; *In re Hutchinson*, 8 Ch. D. 540; *Mussoorie Bank v. Raynor*, 7 App. Cas. 321; *Parnall v. Parnall*, 9 Ch. D. 96; *Meredith v. Heneage*, 1 Sim. 542; *Sale v. Moore*, 1 Sim. 534; *Hoy v. Master*, 6 Sim. 568; *Webb v. Wools*, 2 Sim. (N. S.) 267; *In re Adams*, 27 Ch. D. 394, 406; *In re Williams*, [1897] 2 Ch. 12; *Pennock's estate*, 20 Penn. St. 268; *Clay v. Wood*, 153 N. Y. 134; *Randall v. Randall*, 135 Ill. 398; *Nunn v. O'Brien*, 83 Md. 198.

The cases which we have cited do not resemble in all respects

the one at bar, and there are English and American cases which seem to support the view for which the plaintiff contends. But the question is, whether, taking the will as a whole, it was the intention of the testator to create a trust, and we are of opinion that it was not, and that the construction which we have adopted is in harmony with the more recent English and American cases.

Bill dismissed.

DANIEL EDWARDS vs. CITY OF WORCESTER.

Worcester. October 4, 1898.—October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Personal Injuries — Due Care — Evidence as to Intoxication of Plaintiff —
Expert — Question to Jury as to Ground of Verdict.*

- At the trial of an action for personal injuries alleged to have been received from a defect in a highway, testimony relating to the plaintiff's habits as to temperance and to his reputation for sobriety, offered by him as bearing upon the probability of his intoxication, is rightly excluded; and testimony of witnesses as to whether the plaintiff was intoxicated is rightly admitted.
- At the trial of an action for personal injuries alleged to have been received from a defect in a highway, the testimony of an alleged expert, offered to show whether the road was safe and convenient for travel, relates to a matter on which the common experience and observation of the jury qualifies them to pass, when the actual condition of the way has been described to them, and on which they need no assistance from an expert, and it is properly excluded.
- At the trial of an action for personal injuries alleged to have been received from a defect in a highway, in answer to a question by the judge as to the ground on which the jury found their verdict, the foreman replied that it was on the ground that the plaintiff was not in the exercise of due care. The circumstances under which the question was put were not fully disclosed, and it was stated in the plaintiff's brief that the jury had been out twenty-five hours, but that did not appear in the exceptions. *Held*, that, even if it did appear, it would not render the question improper, nor would the foreman necessarily be unable to state the ground of the verdict.

TORT, for personal injuries alleged to have been received by the plaintiff from a defect in a highway in the defendant city. At the trial in the Superior Court, before *Gaskill, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

C. W. Wood, for the plaintiff.

A. P. Rugg, for the defendant, was not called upon.

MORTON, J. The plaintiff does not rely upon the exception to the exclusion of the testimony relating to his habits as to temperance and to his reputation for sobriety, which was offered by him as bearing upon the probability of his intoxication. The ruling was right. *Carr v. West End Street Railway*, 163 Mass. 360. *McCarty v. Leary*, 118 Mass. 509. *Heland v. Lowell*, 3 Allen, 407.

The testimony of the alleged expert, which was offered to show whether the road was safe and convenient for travel, was properly excluded. It related to a matter on which the common experience and observation of the jury qualified them to pass when the actual condition of the way had been described to them, and on which they needed no assistance from an expert. *Ryerson v. Abington*, 102 Mass. 526, 531. *Bliss v. Wilbraham*, 8 Allen, 564. *Hutchinson v. Methuen*, 1 Allen, 33. *Crane v. Northfield*, 33 Vt. 124. *Graham v. Pennsylvania Co.* 139 Penn. St. 149, 162.

In *Lund v. Tyngsborough*, 9 Cush. 36, the answers of the witnesses were admitted as describing the actual condition of the road within their personal knowledge, and not as expressions of opinion merely.

There is nothing to show that the court erred in putting to the foreman of the jury the question which it did.* The circumstances under which the question was put are not fully disclosed. It is said in the plaintiff's brief that the jury had been out twenty-five hours, but that does not appear in the exceptions, and if it did we do not think that it would render the question improper. *Spoor v. Spooner*, 12 Met. 281. *Dorr v. Fenno*, 12 Pick. 521, 525.

The witnesses were rightly allowed to testify whether the plaintiff was intoxicated. It was not a matter of opinion, any

* The bill of exceptions recites that, "in answer to a question by the court as to the ground on which the jury found their verdict, the foreman replied on the ground that the plaintiff was not in the exercise of due care, because of the rate of speed at which he was going. No poll of the jury was taken on this question, and no written question was previously submitted to them."

more than questions of distance, size, color, weight, identity, age, and many other similar matters are. *Commonwealth v. Sturtivant*, 117 Mass. 122. *Stacy v. Portland Publishing Co.* 68 Maine, 279. *People v. Eastwood*, 14 N. Y. 562.

Exceptions overruled.

ELIZA J. CAREY vs. INHABITANTS OF HUBBARDSTON.
MARIA CUNNINGHAM vs. SAME.

Worcester. October 4, 1898. — October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Due Care — Defect in Highway — Photograph — Evidence — Matter within Discretion of Presiding Justice — Exception — Instructions.

Whether a photograph is properly verified, and also whether it is practically instructive to the jury, are questions to be determined by the presiding justice under the circumstances.

At the trial of an action for personal injuries occasioned to the plaintiff by the collision of the carriage in which he was riding with a stone in a highway of the defendant town, the judge, after stating to the jury that it was the duty of the defendant to keep the way reasonably safe and convenient for travellers, and to "work sufficient width" for that purpose, submitted to them, under instructions to which no exception was taken, the questions whether a sufficient width was worked, whether the stone was a defect, and whether there was negligence on the part of the defendant in allowing it to be there, or in allowing the grass and weeds to grow around it. Then, after defining the degree of due care required of the plaintiff, he instructed the jury, in substance, that if the plaintiff, without any reasonable cause therefor, knowingly drove out of the way prepared for travel, or if he carelessly allowed the horse to get out of it, and in that way was injured by contact with the stone, he could not recover. *Held*, that the instructions were correct.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs by reason of a defect in a highway in the defendant town.

At the trial in the Superior Court, before *Hopkins, J.*, there was evidence tending to show that the plaintiffs were driving to the right around a corner where two roads meet at right angles; that exactly at the vertex of this angle was a large stone, three feet long, two feet wide, and thirteen inches high, intended as a guard stone at the end of a culvert which ran under the road;

that this stone was within from four to twelve inches of the travelled part of the road, and this space and also the space around the other sides of the stone were covered with a growth of grass of about the same height and color as the stone, so that the stone was not apparent in approaching it in the road; that the ground around the stone was upon the same level as the road; that on the right hand side of the road, outside of the grass, was a bank with a stone wall on top of it, so that the plaintiffs could not see across the corner into the other road; and that in driving around the corner the wheel of the plaintiffs' carriage struck the above described stone, and the plaintiffs were thrown out and injured.

The jury returned a verdict for the defendant in each case, and the plaintiffs alleged exceptions to the exclusion of evidence and to instructions to the jury, the nature of which appears in the opinion and in a note by the reporter.

C. F. Baker, for the plaintiffs.

E. H. Vaughan, for the defendant.

HAMMOND, J. 1. The question whether the photograph was properly verified, and also whether it was practically instructive to the jury, was to be determined by the presiding justice under the circumstances. *Blair v. Pelham*, 118 Mass. 420. *Verran v. Baird*, 150 Mass. 141. One photograph had been already introduced, and, although it did not show the appearance of the stone, the justice may have thought that the second photograph, which it was conceded did not show the actual condition of the grass and weeds at the time of the accident, would be misleading rather than helpful. We see no ground for holding that there was error in excluding it.*

* The second photograph showed the location in question around the corner, including the travelled part of the way, the stone, the grass or grass and weeds around the stone, and the line of the grass along the travelled part of the way and between the stone and the travelled way, the growth of grass being then short and close to the ground. The defendant objected to the admission of this photograph, on the ground that it was taken at a season of the year which did not show the grass and foliage as they existed at the time of the accident. The defendant's counsel stated that he did not claim that there was any change in the location as shown in the photograph since the accident, except in the matter of the growth of grass and foliage. The justice excluded the photograph; and the plaintiffs excepted.

2. After stating that it was the duty of the defendant to keep the way reasonably safe and convenient for travellers, and to "work sufficient width" for that purpose, the presiding justice submitted to the jury, under instructions to which no exception was taken, the questions whether a sufficient width was worked, whether the stone was a defect, and whether there was negligence on the part of the defendant in allowing it to be there, or in allowing the grass and weeds to grow around it.

He then defined the degree of care required of the plaintiff, and used this language: "Now, under those circumstances, is it a proper thing to do to drive off the travelled part of the way upon that grass? Would that be due care? If so, she was exercising due care. If it is not due care, she would not be exercising due care, and it would bar her from recovery."

Then follows that part of the charge to which exception is taken, as follows:

"If Mrs. Cunningham knowingly drove out of that portion of the way prepared for travel without being forced so to do by some peril or danger in the travelled way, and without any reasonable cause therefor, she took the chances of contact with any object that might be outside of the way, and for the effects of that contact she could not recover.

"You see this is a case where I suppose she does it knowingly. When she sees there are grass and weeds growing by the side of the way, and she knowingly and wilfully drives upon the grass outside the travelled part of the way, when there is no danger in the way itself which causes her so to do, and when there is no reasonable necessity for her so to do, under those circumstances she takes the chances of any collision that may take place with any obstacle that is obscured from her view by the growing grass and weeds.

"If she heedlessly and carelessly allowed her horse to get out of the travelled way, she then took the risk incident to passage over that portion of the road which is outside of the travelled way. I give you these specific instructions because of the nature of the evidence in the case, and in order that the rights of all parties may be preserved.

"If she knowingly went out of the way, and there was nothing in the way to force her out, if there was no reasonable cause

for her to go out, and she entered upon that part of the way which was not wrought for travel, then she did it at her own risk, and the consequences would fall upon her.

"If, on the other hand, unthinkingly, carelessly, and not observing where the horse was going, allowing him to take his own course, she let him wander outside the travelled part of the way on to the grass ground and there met with an obstacle, the consequence would fall upon her and she could not recover."

We understand these instructions, taken in connection with what precedes, to say in substance that if the plaintiff, without any reasonable cause therefor, knowingly drove out of the way prepared for travel, or if she carelessly allowed the horse to get out of it and in that way was injured by contact with the stone, she could not recover; and such we understand to be the law. *Tisdale v. Norton*, 8 Met. 388. *Shepardson v. Colerain*, 13 Met. 55. *Harwood v. Oakham*, 152 Mass. 421.

The remaining exceptions were waived in the defendant's brief.

Exceptions overruled.

MARY BARRY vs. BOSTON AND ALBANY RAILROAD COMPANY.

Worcester. October 4, 1898. — October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Personal Injuries — Railroad — Negligence — Instructions — Law and Fact —
Declaration — Variance.*

In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, the defendant is not entitled to a ruling that "the act of the brakeman in calling the station and the actual stopping of the train are not evidence to warrant a finding that the defendant negligently led the plaintiff to suppose the train had reached the place for him to alight," there being other circumstances bearing upon the question whether the plaintiff supposed the train had reached such place, and has no ground of exception to the ruling that "the act of the brakeman in calling the station and the actual stopping of the train are to be considered by you in connection with the care which it was necessary for the plaintiff to use in the exercise of his senses to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for him to alight."

In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, a ruling requested by the defendant, that "the action of the brakeman in calling the station was not an invitation to alight from the train at all, or, if it was, it was not an invitation to alight from the train until it had come to a stop at the station where it was designed to discharge the passengers," is fairly covered by the ruling that "he was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped; he must use his senses."

If the declaration in an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train alleges that "at or near the station at S. the defendant's employee called out in the car in which the plaintiff was seated, 'S.,' and thereupon the said car stopped and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car," and that, as he was on the point of doing so, the train suddenly started and he was thrown to the ground and injured, the defendant is not entitled to a ruling that "on the pleadings and evidence in this case there can be no recovery unless the train had come to a stop at the place designed for passengers to alight," and proof that the train stopped elsewhere than at such place is no variance.

In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, the defendant is not entitled to a ruling that "the evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight," if the evidence is conflicting upon that point, but the effect of the whole evidence is for the jury, and it cannot be said, as matter of law, that they were not justified in reaching the conclusion which they did.

TORT, for personal injuries sustained by the plaintiff while a passenger on the defendant's railroad. The declaration alleged that "at or near the station at South Framingham the defendant's employee called out in the car in which the plaintiff was seated, 'South Framingham,' and thereupon the said car stopped and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car; that as she was on the point of stepping from said car the train suddenly started and she was thrown with great force to the ground," and was injured.

Trial in the Superior Court, before *Gaskill, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that she purchased a ticket, and left Worcester at five minutes past nine o'clock in the evening; that

the train did not stop between Worcester and South Framingham; that there was nobody in the car but herself and two girls, and on the way from Westborough to South Framingham the two girls moved into the car ahead; that she was in the car alone at the rear end thereof from Westborough to South Framingham; that she sat with her arm on the window, and the brakeman came to the front of the car, and said, "South Framingham," twice; that she never moved until the car came to a standstill, and then she stepped down on to the third step and was about taking the fourth step on the platform when the car started, and that was all that she knew or remembered; that she was sitting in the second seat from the door at the end of the car, and the brakeman came to the forward end of the car and made the announcement, and then she got up and went out on the platform; that she had frequently been on the train; that it was the seventh time she had taken this train within a year; that the first knowledge she had that the car was in motion after she got up to go on the platform was when she had taken the first step, and as she was going to step on the last step the car started with full force; and that there were four steps on the car, and she had taken three steps before she knew the car was in motion.

On cross-examination, she testified that she knew where the platform was and where the station was; that she got on the rear end of the rear car on that train; that there was no car behind the car that she got on; that she kept the seat that she took at Worcester all the way, and never moved at all; that she sat on the right hand side of the car; that she got out of the car on the same platform of the car as that on which she entered it; that she knew before the brakeman spoke where she was, or knew pretty well where she was; that she kept watch so that she knew where she was; that all the brakeman said was, "South Framingham," twice; that she did not see any electric lights at the station; that she saw the electric lights in the cars; that she did not see where the car was with reference to the South Framingham station; that when the brakeman holloed she sat there until the train came to a standstill, and then she got up; that she had to take three or four steps to get on the steps of the car; that she looked to pick her steps, as it was dark when she got

out; that when she got out on the platform of the car she did not look to see where the car was; and that she saw the platform of the station there.

Her examination was continued as follows:

“Q. Did you step out on the platform or not? A. I did not step on the platform. — Q. What did you step on? A. I stepped on the last step of the car and just my step on the railroad. — Q. What were you going to step on? A. That is all I know. I don’t know anything what became of me. — Q. You knew what you looked to see, what you were going to step on? A. I did. — Q. Did you see whether you were going to step on the platform or going to step off on the track or on the ground? A. I stepped on the track, on the step of the platform. — Q. Which, the track or platform? A. I could n’t tell you. — Q. You did not know anything what you were going to step on? A. I stepped on to the platform of the cars. — Q. You mean the platform of the station? A. Yes.”

She testified further that she tried to step off on the platform; and that when the train started she was stepping on the fourth step and just stepping on the platform.

The defendant called ten witnesses, who testified that the train was made up of the engine, baggage car, a smoking car, two common coaches, two parlor cars, and a dining car. All the witnesses but one testified that the two common coaches were ahead of the two parlor cars, and that the dining car was at the rear end of the train next to the two parlor cars. The engineer said the two parlor cars were ahead of the two coaches. All the witnesses who testified as to the whereabouts of the plaintiff after she fell testified that she was found opposite the rear trucks of the dining car, on the earth, where there was no platform, and at a point which was westerly of the Milford Branch track, and at a distance of some two hundred feet from the west end of the station.

The plaintiff was found by the rear end brakeman, who was on the rear end of the dining car, after the train had come to a final stop at the station.

The plaintiff’s testimony was that she was in a common coach and not in a parlor car.

The evidence for the defendant tended to show that the plain-

tiff was in the rear end of the rear common coach; that if the common coaches were in the rear of the parlor cars and next to the dining car, then nearly the whole length of the dining car passed the point where she stepped or was thrown off after she was so thrown off; that if the common coaches were ahead of the two parlor cars, then the whole length of the two parlor cars and nearly the whole length of the dining car passed the point where she stepped or was thrown off after she so stepped or was thrown off; and that the train made no stop until it reached the final stop at the station, and made no start after its final start, until it finally started for Boston, after the plaintiff had been found upon the ground.

The defendant asked the judge to rule as follows:

"1. If the plaintiff undertook to step off the train when it was in motion, and was injured in consequence, she cannot recover.

"2. If the train had not come to a stop when she attempted to step off, she cannot recover, whether she knew it was in motion or not.

"3. The plaintiff cannot recover unless the train, at the time she attempted to step off, had come to a stop at the place designed for passengers to alight, unless there is evidence to satisfy the jury that the defendant negligently led the plaintiff to suppose the train had reached and stopped at such place.

"4. The act of the brakeman in calling the station and the actual stopping of the train are not evidence to warrant a finding that the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight.

"5. She was bound to use due care to ascertain whether the train had reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman announced the station, and the train had stopped.

"6. The action of the brakeman in calling the station was not an invitation to alight from the train at all, or, if it was, it was not an invitation to alight from the train until it had come to a stop at the station where it was designed to discharge the passengers.

"7. On the pleadings and evidence in this case there can be no recovery, unless the train had come to a stop at the place

designed for passengers to alight, and while the plaintiff was, in the exercise of due care, in the act of alighting, the train was negligently started.

"8. The evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight."

The judge gave the first three and the fifth rulings only in the form requested; declined to give the eighth request in any form; and instructed the jury, among other things, as follows:

"The practical contention comes to this: Had the train come to a standstill, and did the plaintiff, in relying upon that fact and the announcement which had been given of South Framingham, attempt to alight, believing the station had been reached, and in the exercise of due care, was she injured by the sudden starting of the train?

"First, then, had the train come to a standstill? If it had not, then the plaintiff cannot recover. . . . It is for you to say as between the conflicting testimony whether you are satisfied by a fair preponderance of the evidence that the train had come to a standstill. If it had, then the next question for you to determine, in order that the plaintiff may recover, is whether the train was negligently started by the defendant without notice to her and without any information that would lead her to believe, or lead a reasonable, prudent, and careful person to believe, that the train was about suddenly to start. If you are satisfied of that, then, so far as the negligence of the defendant is concerned, if she, the train having come to a standstill, attempted to alight and was thrown by the sudden starting of that train, she being in the exercise of due care herself, then it is competent for you to consider whether that act of suddenly starting the train was an act of negligence on the part of the defendant, which was the proximate cause of the injury to her. If she fell off, if she started to get off while that train was in motion, if, supposing that the train had stopped or was about stopping, she suddenly jumped off, then she cannot recover.

"Upon the question of the defendant's negligence, I will further instruct you that the plaintiff cannot recover unless the

train, at the time she attempted to step off, had come to a stop at a place designed for passengers to alight, unless there is evidence to satisfy you that the defendant negligently led the plaintiff to suppose that the train had reached and stopped at such a place.

“The act of the brakeman in calling the station and the actual stopping of the train are to be considered by you in connection with the care which it was necessary for her, the plaintiff, to use in the exercise of her senses to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight.

“If you are satisfied of those things, then there is one other fact which must be proved by the plaintiff, and that is that she was in the exercise of due care herself in stepping from the train at a proper place. . . .

“She was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped. I think I substantially covered that before. She must use her senses. Simply because somebody said, ‘South Framingham,’ is not enough. She must use her senses about it.

“If the plaintiff fails to satisfy you, either that the train had not come to a standstill, or that she alighted at the proper place or was in the exercise of due care, then the verdict must be for the defendant.”

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding & W. C. Mellish, for the defendant.

J. R. Thayer & A. P. Rugg, for the plaintiff.

HAMMOND, J. At the close of the evidence, the defendant requested the court to give certain rulings, eight in number. The court gave the first three and the fifth. The fourth was rightly refused in the form presented. There were other circumstances bearing upon the question whether the plaintiff supposed the train had reached the place for her to alight, and the court was not bound to rule upon the effect of the two facts named in the request considered as detached from all the others.

The instruction that "the act of the brakeman in calling the station and the actual stopping of the train are to be considered by you in connection with the care which it was necessary for her, the plaintiff, to use in the exercise of her senses to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight," sufficiently covered the subject matter of the request.

The subject matter of the sixth was fairly covered by the instruction that "She was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman had announced the station, and the train had stopped. I think I substantially covered that before. She must use her senses. Simply because somebody said, 'South Framingham,' is not enough. She must use her senses about it."

The seventh was rightly refused. The declaration did not require the plaintiff to prove that the train actually had come to a stop at a place designed for passengers. It alleges that "at or near the station at South Framingham the defendant's employee called out in the car in which the plaintiff was seated, 'South Framingham,' and thereupon the said car stopped and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car; that as she was on the point of stepping from said car the train suddenly started, and she was thrown with great force to the ground." It nowhere states where the train stopped, and proof of a stopping elsewhere than at the place designed for passengers to alight was no variance. The rest of the request was given, subject to the modification contained in the latter part of the third instruction, which was given. This was all the plaintiff was entitled to.

The refusal to give the eighth presents a question of more difficulty. The evidence produced by the defendant seems to have a very strong tendency to show that, at the time the plaintiff attempted to get off, the train had not come to a stop at the place designed for passengers to alight. On the other hand, the plaintiff testified that when she was stepping out she saw

the platform of the depot, and tried to step upon it, and that she "was stepping on the fourth step and just stepping on the platform."

It is argued for the defendant that in other parts of her testimony it appears that she did not know what she was going to step on when she left the car, and that in saying she saw the platform she was mistaken; and there is much in her testimony to support this contention. But the effect of the whole evidence was for the jury, and, there being a conflict, we cannot say, as matter of law, that they were not justified in coming to a conclusion the other way. *Exceptions overruled.*

PROVIDENCE AND WORCESTER RAILROAD COMPANY
& another, petitioners.

Worcester. October 5, 1898. — October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Grade Crossing — Statute — Auditor — Report — Equity Jurisprudence and Rules — Fees of Counsel and Engineers — Town — "Costs and Expenses."

Although the language of St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," is that the report of the auditor when confirmed by the court shall be final, still it is not to be construed as taking away the general authority of a single justice to report to the full court questions of law arising in equity.

It is too late to raise in this court the point, not taken in the Superior Court, that a town has no standing here because it did not file in the Superior Court objections to the report in accordance with Equity Rules XXXI. and XXXII. of that court.

Expenses incurred by a town in employing counsel to appear at hearings in the Superior Court in opposition to the appointment of a commission to make separation of a grade crossing under St. 1890, c. 428, to represent the town in the selection of commissioners after the decision of the court to appoint, to oppose before the commission any abolition whatever, and to advocate before the commission, after its decision to abolish the crossing, a different plan of separation from that presented by the railroad company, and expenses incurred by it in employing a civil engineer to prepare and present plans to the commission, which were not adopted, it appearing that the town, by vote at a town meeting, appointed a committee with authority to employ counsel and an engineer for the purposes stated, and that the reasonableness of the charges was not in dispute, cannot be allowed by the auditor as part of the "cost of the

hearing," under § 3 of the statute, or as part of the "expense incurred by the town," under § 7, to be apportioned between the railroad company, the Commonwealth, and the town.

PETITION, by the Directors of the Providence and Worcester Railroad Company, under St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," for the abolition of two grade crossings in Uxbridge.

The supplemental report having been recommitted to the auditor by the Superior Court, with instructions to find and report to that court the facts relating to certain items of expense, the auditor found and reported, and a hearing was had before *Richardson, J.*, who disallowed the items, the nature of which appears in the opinion, and reported the case for the determination of this court.

J. L. Hall, for the petitioners.

G. S. Taft, for the town of Uxbridge.

HAMMOND, J. The items in dispute were disallowed by the auditor and by the justice of the Superior Court, and the question whether this was correct comes to us upon a report made by the justice.

Although the language of the statute is that the report when confirmed by the court shall be final, still it is not to be construed as taking away the general authority of a single justice to report to the full court questions of law arising in equity. Pub. Sts. c. 151, § 20. St. 1883, c. 223, § 2.

The petitioners contend that the town has no standing here, because it did not file in the Superior Court objections to the report, in accordance with Equity Rules XXXI. and XXXII. of that court. But the point does not seem to have been taken there, and it is too late to raise it now.

We are therefore brought to the question in the case, which is whether expenses incurred by a town in employing counsel to represent it in the Superior Court and before a commission appointed to make separation of a grade crossing under St. 1890, c. 428, and in employing a civil engineer to prepare plans to present to the commission, should be allowed by the auditor as part of the "cost of the hearing," under § 3, or as part of the "expense incurred by the town," under § 7 of that act, to be apportioned between the railroad company, the Commonwealth, and the town.

The legal services consisted in part in appearing at hearings in the Superior Court in opposition to the appointment of a commission, and representing the town in the selection of commissioners after the decision of the court to appoint; in part in opposing before the commission any abolition whatever; and in part advocating before the commission after its decision to abolish the crossing a different plan of separation from that presented by the railroad company.

The engineering services consisted in preparing and presenting to the commission the town plans for the abolition. The commission adopted the railroad plan. The town, by vote at a town meeting, appointed a committee with authority to employ counsel and an engineer for the purposes stated. The reasonableness of the charges is not in dispute.

The seventh section of the statute simply provides the machinery by which the items named in the third section may be apportioned, and cannot be held to vary them in any way.

The decision of the question therefore depends upon the interpretation to be given to the following language of the third section: "The railroad companies shall pay sixty-five per centum of the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages, including those mentioned in section five of this act." These items cannot be considered as a part of the total cost of the alterations. They were incurred before the decree for alterations was made, and in opposition to the decree, and not for the purpose of performing it. Instead of being incurred in carrying out the decree, they were incurred to prevent it. In these respects the case materially differs from *Boston & Albany Railroad v. Charlton*, 161 Mass. 32. In this latter case the expenses were incurred by the town in a *bona fide* attempt to ascertain the land damages.

Nor do we think these items can be allowed as a part of the "cost of hearing" before the commission. A review of the history of the legislation on this matter is here instructive. When railroads were first established, the acts of incorporation usually authorized them to raise or lower highways so as to pass under or over them, and forbade the obstruction of highways. St. 1826,

c. 183, § 6. St. 1829, c. 26, § 5. St. 1830, c. 4, § 11. St. 1830, c. 93, § 9. St. 1830, c. 94, § 10. St. 1830, c. 95, § 11. St. 1833, c. 187. These provisions were incorporated in Rev. Sts. c. 39, §§ 66, 67, and 68. The first statute authorizing proceedings for the abolition of grade crossings was St. 1842, c. 22: "If the selectmen of any town, or the mayor and aldermen of any city, wherein any turnpike, highway, or town way, crossed by any railroad, on a level therewith, is situated, shall be of opinion that it is necessary for the security of the public that said turnpike, highway, or town way should be raised or lowered, so as to pass over or under said railroad, said selectmen or mayor and aldermen may, in writing, request the corporation to which said railroad belongs to raise or lower said ways; and if said corporation shall neglect or refuse so to do, said selectmen or mayor and aldermen may apply to the county commissioners of the county within which said town is situated to decide upon the reasonableness of such request; and if said commissioners, after due notice and hearing the parties, shall decide that the raising or lowering of said ways is necessary for the security of the public, said corporation shall comply with said decision, and shall pay the costs of the application; and if the said commissioners shall be of opinion that such alteration of said ways is not necessary, the said selectmen or mayor and aldermen shall be liable to pay the costs of their application." This statute was re-enacted in Gen. Sts. c. 63, §§ 53, 54. This last statute was repealed by St. 1872, c. 262. Section 1 provides that, if upon application the county commissioners decide that no alteration is necessary, "the party making the application shall pay the costs." Section 2 is as follows: "The party by whom such decision shall be carried into effect shall be determined upon the award of a commission consisting of three disinterested persons, one of whom shall be named by the county commissioners, if the way that crosses or is crossed by the railroad is a highway, or by the selectmen or mayor and aldermen if it is a town way; one by the railroad corporation interested; and the third shall be a member of the board of railroad commissioners designated by said board. Said commission shall be named within thirty days after the decision that an alteration is necessary, and shall meet within sixty days; and the said commission shall also de-

termine by what party all charges and expenses occasioned by making such alteration, and all future charges for keeping in repair such crossing and the approaches thereto, as well as all costs of the application to the county commissioners, or of the hearing before said commission, shall be borne; or said commission may apportion all such charges, expenses, or costs between the railroad corporation and the town, city, or county in which said crossing is situated, and the award of said commission shall be final." And this is substantially re-enacted in St. 1874, c. 372, §§ 96, 98, and in Pub. Sts. c. 112, §§ 129 and 131.

Then comes the statute in question, — St. 1890, c. 428. It will be observed that in the previous statutes the costs which were to be apportioned were, until St. 1872, c. 262, "the costs of the application to the county commissioners"; but when special commissioners were appointed, and up to St. 1890, c. 428, the costs were the costs of the application to the county commissioners, and of the hearing before said special commissioners.

Since, under St. 1890, c. 428, the petition was to be made to the Superior Court, there was no occasion to continue the provision concerning costs before the county commissioners, and so that concerning the cost of hearing before the special commissioners only was retained.

There can be no doubt that the same general kind of expense is meant by the term "cost of hearing" as by the cost of "application before the county commissioners." Prior to St. 1872, c. 262, the whole matter of alterations was passed upon by the county commissioners, and in that case there were no other costs to be paid but those of the application to them; but when a part of the work was delegated to a special commission, then it became necessary to include the cost of hearing before the latter in order to cover some of the cost which had theretofore come in under costs of application to the county commissioners.

A similar provision is contained in the act for laying out highways. Pub. Sts. c. 49, § 2. But these provisions concerning costs before the county commissioners never have been held to relate to costs between the parties, or to the costs incurred by the respective parties in the preparation and trial of their respective sides of the controversy, but merely to the costs incurred

by the county commissioners or the tribunal as a court, and they are simply intended to protect the public treasury from the expense of holding the court and of investigating the questions presented. *Gifford v. Dartmouth*, 129 Mass. 135. No part of the items in question were incurred for that purpose, and they were rightly disallowed.

Items disallowed, and decree accordingly.

WILLIAM H. JOHNSON vs. CITY OF WORCESTER.

Worcester. October 5, 1898. — October 20, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Personal Injuries — Negligence in Filling and Guarding Trench in Highway
— Liability of City — Law and Fact.*

If a depression about two feet wide and three feet long appears in that part of a highway in a city through which a pipe has been laid by its water department, the trench dug for the purpose of laying the pipe having been filled, and there having been an unusual rain storm immediately preceding the accident, and the depression being filled with water, in an action against the city for injuries caused by the depression it cannot be said, as matter of law, that the jury were not warranted in finding that the settling of the earth was due to negligent filling; and it is also a question for the jury whether, if the trench was properly filled, its subsequent defective condition arose during the progress of the work so as to render the city liable for negligence in not guarding the trench.

TORT, for loss of the society and services of the plaintiff's wife, Emily W. Johnson, and for expenses incurred by him by reason of her being thrown from a carriage in which she was travelling on a defective highway in the defendant city, and sustaining personal injuries.

At the trial in the Superior Court, before *Bond, J.*, it appeared that the defect was caused by a depression in the street through which a water pipe had been laid; that the trench dug for the purpose of laying the pipe had been filled; that a rain storm of thirty-four hours' duration had immediately preceded the accident, which occurred on October 14, 1895; and that the plaintiff's wife drove into the depression, which was at the lower end

of the refilled trench, about two feet wide and three feet long, and filled with water.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

A. P. Rugg, for the defendant.

F. P. Goulding, (*C. R. Johnson* with him,) for the plaintiff.

HAMMOND, J. The defendant asked for various rulings, none of which were given in the form presented. All are waived upon the defendant's brief, "except those that go to the essence of the plaintiff's case."

The first contention of the defendant is that there is no evidence to warrant a finding by the jury that the trench was negligently filled; that the burden of proving negligence was on the plaintiff, and that the evidence, taking it most favorably to the plaintiff, left it in doubt whether the settling was not caused by the rain falling upon a trench filled in the most approved manner; that at best it left it in doubt as to which of two different causes, for only one of which the defendant was responsible, led to the accident; and that the jury must have resorted to mere "surmise, conjecture, and suspicion" in order to find for the plaintiff.

Upon looking at the evidence, it appears that the earth was "quite sandy . . . for perhaps a distance of three or four hundred feet." The place of the accident was where by means of a "taper" the connection was made between the twenty-four-inch pipe and the twenty-inch pipe. The two knees which at this point had connected the old cement pipe on the south side of the road were left in the ground; and it does not appear that there was any settling anywhere else on the trench. It is true that Brady, the water commissioner, and Doyle, the foreman, both described the general plan followed in filling the trench, and testified that such a plan was proper, and Allen, the expert engineering witness, testified that the plan was proper and the usual one followed. But the testimony of Brady was that he was at the work "perhaps an hour and a half per day," and Doyle testified that, although he saw the filling going on around the taper and described the method, yet he "was not there during all of the time, but was back and forth." It does not appear that any of the men who actually did the filling were called by the defend-

ant, but it did appear that Leary, the calker who did a part of the work, was dead. There is also other evidence bearing upon the question.

The contention of the defendant was that the trench was properly filled, and that the settling was due to the unusual storm immediately preceding the accident; that the fall of rain was greater than was reasonably to be anticipated, and that the failure to provide against such a storm was consistent with due care in filling the trench.

The contention of the plaintiff was that the storm was reasonably to be anticipated, that the failure to provide against it was negligence, and that, considering the unusual state of things at this point and the whole evidence of the filling, the jury might well find that the most reasonable explanation of the settling was that the trench was not properly filled.

Upon these matters the jury were instructed in a manner not now excepted to, except so far as inconsistent with the request to rule that there was no evidence to show negligence. We cannot say, as matter of law, that the jury were not warranted in finding that the settling was due to negligent filling. The plaintiff was not bound to prove it beyond a doubt, and the jury may have found that to have been the most reasonable explanation. *Griffin v. Boston & Albany Railroad*, 148 Mass. 143. *Neveu v. Sears*, 155 Mass. 303.

The defendant further contends that the case should not have been submitted to the jury upon the question of negligence in guarding the trench. Upon this branch of the case the contention of the defendant is that prior to the time of the accident it had ceased to work as a water pipe layer at the place of the accident, and that, if due care was exercised in filling the trench, it had performed its whole duty as such pipe layer; that the highway some days before had been open to public travel; that for the subsequent settling the only liability of the defendant was its statute liability for defects within its highways, and that there was no evidence to show that the place needed or was receiving any further attention from the defendant as such pipe layer at the time of the accident.

The plaintiff contends to the contrary.

As to this it is settled that, if in the progress of the work there is negligence in guarding the trench in the highway, the defend-

ant may be held liable at common law. *Fox v. Chelsea*, 171 Mass. 297.

The real question on this branch of the case is whether, assuming the trench to have been properly filled, the subsequent defective condition of the trench arose during the progress of the work. On this point it appeared that there was a superintendent of streets having general oversight of the streets and charged with the duty of keeping them in proper condition, and that there is an ordinance of the defendant which, so far as material, is as follows: "The water commissioner shall have the care and control of all ponds, streams, waters, reservoirs, aqueducts, and other property acquired or held by the city for the purpose of obtaining or furnishing a supply of pure water for the use of its inhabitants; shall maintain the same in good order and condition; shall use and operate the same and furnish all supplies required therefor; shall take all measures necessary to protect and preserve the purity of all waters; shall purchase, lay, and maintain all pipes, conduits, and other fixtures and appliances necessary for obtaining or supplying water for the inhabitants of the city." There was evidence tending to show that the water department were engaged that fall in laying a water pipe in Main Street, beginning forty feet westerly of Winchester Avenue, and running westerly 8,600 feet to and into the town of Leicester; that they began at the easterly end near the avenue and laid 2,000 feet westerly therefrom to Hunt's Corner; that before the accident this entire trench of 2,000 feet was filled, and the street was opened for travel, and was actually used by the public for all this time; that the condition of this portion of the way was described by witnesses as level, except that the part over the trench was rounded up somewhat, and that no guard was placed upon the trench or care taken of it thereafter until the rain came; and that the water department immediately after closing this trench began laying pipes in the town of Leicester, beginning about 2,000 feet beyond Hunt's Corner. Brady, the water commissioner, testified: "We laid about two thousand feet and then skipped and went farther west. The two thousand feet from Winchester Avenue would take up to about Hunt's Corner. We began to lay this two thousand feet early in September. We began about forty feet west of the west line of Winchester Avenue to lay. From that point towards the city there was a twenty-

inch pipe to this side of Gates Lane. At some time before, we had laid a cast iron pipe to about forty feet west of the west line of Winchester Avenue, and then we continued that twenty-four-inch pipe along up towards Leicester. We connected it with what we call a 'taper.' It is made one end smaller, and the taper is about three feet long, and the difference between a twenty-four-inch and twenty-inch was in that three feet, or about three feet, I do not remember the exact length. We commenced at this point, forty feet west of Winchester Avenue, and excavated on the north side of the street for this twenty-four-inch pipe, and we laid to a point near Hunt's Corner where this cement pipe was on the north side, and then we connected both ends. When we had completed laying this twenty-four-inch pipe of this strip of two thousand feet we disconnected this cement pipe, and then we came back and filled this place. We made an excavation about four feet wide on top and six feet deep, and perhaps a foot narrower at the bottom than at the top. We laid this two thousand feet, with the exception of twenty-five or thirty feet at the east and west end, and then we connected the two ends." He further testified that after the accident the water department made the repairs. During the rain storm and after it, up to the time of the accident, the defective spot was cared for only by the water department.

There was some conflict as to when, with reference to the accident, the trench was dug and filled.

One Clark, for the plaintiff, testified, "I should think the trench was dug about two weeks before, or within two weeks."

One Brady, for the defendant, says, "We began to lay this two thousand feet early in September"; but on cross-examination he says, "I do not state exactly whether we began there the latter part of September or three weeks before the 14th of October."

Upon the whole evidence, it was a question for the jury whether that part of the work was still in the charge of the water department as a part of the original work; and this question having been submitted to the jury upon instructions not now excepted to, except so far as inconsistent with the request that the plaintiff is not entitled to a verdict upon the evidence, the exceptions must be

Overruled.

WILLIAM J. HOGG & another vs. AMERICAN CREDIT
INDEMNITY COMPANY.

Worcester. October 6, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Losses from Insolvency occurring after the Term of a Bond of Indemnity.

An action was brought upon a bond of indemnity against loss resulting from insolvency of debtors "on total gross sales . . . amounting to \$120,000 or less . . . to be made" between June 15, 1896, and June 14, 1897, when the bond was to expire. By a rider "covered losses, occurring after payment of premium, on sales and shipments made" from April 1, 1896, to June 15, 1896, might be proved. By the fourth condition, "notification of claims must be delivered to this company . . . within ten days after" information by the indemnified of the debtor's insolvency and received at the company's central office at S. during the term of the bond, otherwise to be barred. By another condition there was to be a final statement of all claims filed according to the fourth condition, and it was to be received at the office within thirty days after the expiration of the bond, otherwise all claims to be barred; and claims were to be adjusted within sixty days after receipt of such final statement, the amount due to be then payable. By still another condition, "In case this bond is renewed, . . . loss on sales covered . . . resulting after said date of expiration upon shipments made during the term of this bond, may be proven, . . . subject also to the terms and conditions of such renewal." Then followed a similar provision in case this bond was a renewal. The loss in respect of which the plaintiff claimed indemnity was upon sales made within the time limited by the instrument, but the insolvency causing the loss in each case occurred after June 14, 1897. *Held*, on demurrer to the declaration, that the bond did not cover the loss.

CONTRACT on a bond of indemnity. Writ dated March 26, 1898. The defendant demurred to the declaration, assigning ground therefor which is stated in the opinion. The Superior Court sustained the demurrer; and the plaintiff appealed to this court. The facts appear in the opinion.

C. A. Merrill, for the plaintiffs.

E. R. Champlin, for the defendant.

HOLMES, J. This is an action upon a bond of indemnity, within certain limits, against loss resulting from insolvency of debtors, as afterwards defined, "on their total gross sales . . . amounting to \$120,000 or less; said sales . . . to be made between the 15th day of June, 1896, and the 14th day of June, 1897, both days inclusive." The bond was "to expire on the

14th day of June, 1897." By a rider attached to the bond, "covered losses, occurring after payment of premium, on sales and shipments made from the 1st day of April, 1896, to the 15th day of June, 1896, may be proven under this bond," etc. The two losses in respect of which the plaintiffs claim indemnity may be assumed to have been upon sales made within the time limited by the instrument, but the insolvency causing the loss in each case occurred after June 14, 1897. The defendant demurs, the principal ground of demurrer being that the bond does not cover losses from insolvency occurring after the term of the bond.

As we are of opinion that the defendant must prevail upon this ground, we do not go into details which are unnecessary for the discussion of this point. We fully appreciate the great probability that a business man reading the contract without warning might understand that he was getting the protection which the plaintiffs claim. We appreciate the small worth or worthlessness of the bond for sales made during the last part of the term covered, when we consider the definition which it gives for the term "insolvency of debtors" as used in the bond.* If we could see a reasonable doubt as to the meaning of the instrument, we should give the plaintiffs the benefit of it. But whatever doubt may be left by the words "to expire on the 14th day of June, 1897," seems to us removed by the language of three conditions, all of which lead to the same result.

By the fourth condition, "Notifications of claims must be delivered to this company . . . within ten days after the indemnified shall have had information of the insolvency of any debtor, and must be received at the central office of the company at St. Louis, Mo., during the term of this bond, otherwise such claims

* The bond contained the following provision: "The term insolvency of debtors whenever used in this bond is defined to be: where a debtor has made a general assignment for the benefit of his creditors; where an attachment for a debt for merchandise shall have been levied on his general stock in trade; where a writ of execution against him shall have been issued in favor of the indemnified, and returned unsatisfied, except where such execution has been so issued and returned after a receiver has been appointed of the property of such debtor; where a receiver of the general stock in trade of a debtor shall have been appointed and the amount of the claim of the indemnified has been ascertained by final decree, in the receivership proceedings, in which event the net loss thus ascertained shall be included in the calculation of losses under this bond."

shall be barred." This is perfectly explicit, and cannot be reconciled with the plaintiffs' construction except by arbitrarily assuming that construction to be correct. The plaintiffs say that it must be limited to cases where the conventional insolvency occurs during the term of the bond. Of course it must, as it could not be complied with in any other. But the conclusion is not that there are other cases for which the bond makes no provision at all, but that this requirement, universal in form, is universal in fact, and covers all the cases to which the bond applies. So by condition 12 C: "A final statement of all claims which have been filed in accordance with condition No. 4 shall be made. . . . Such final statement must be received at said office within thirty days after the expiration of this bond, otherwise all claims hereunder shall be forever barred. The adjustment of claims shall be had within sixty days after receipt of such final statement by the company, and the amount then ascertained to be due shall at once become payable." This plainly provides for the winding up of all claims upon the bond. Finally, by the eighth condition, "In case this bond is renewed, . . . loss on sales covered, . . . resulting after said date of expiration upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal." Then follows a similar provision in case this bond is a renewal. This contemplates cases like the present, and contemplates and encourages renewals as the means by which bondholders could get the benefit of continuous insurance.* Unless that means is resorted to, there is no protection for losses "resulting after said date of expiration upon shipments made during the term of this bond."

Judgment affirmed.

* The length of time for which the notes were given did not appear, but it did appear from the declaration that the period of credit was extended by renewals from time to time during a full year from the date of sale, "the last renewal notes falling due in June and July, 1897."

ALLEN J. ELLSBURY vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Worcester. October 6, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Master and Servant — Action.

A railroad corporation is not liable for injuries sustained by an experienced person in its employ, while attempting to couple two cars together by the use of a link and pin, in obedience to orders, because the drawbars of the cars, one of which belonged to another corporation, were of unequal height, causing one drawbar to slide over the other, and such person, who held the link, to be crushed between the sills of the cars.

TORT, for personal injuries received by the plaintiff while in the defendant's employ. The declaration contained three counts, the first under the employers' liability act, St. 1887, c. 270, the second at common law, and the third under St. 1895, c. 362. Trial in the Superior Court, before *Hopkins, J.*, who directed the jury to return a verdict for the defendant; and reported the case for the determination of this court. The facts appear in the opinion.

J. E. McConnell, for the plaintiff.

F. P. Goulding, (*W. C. Mellish* with him,) for the defendant.

HOLMES, J. This is an action of tort for injuries received while attempting to couple two cars together in obedience to orders. The two cars had different kinds of drawbars; one, belonging to the defendant, a Miller, the other belonging to the Pennsylvania Railroad, a Jenny. They could be coupled only by the use of a link and pin. A fellow servant of the plaintiff put a link into the Pennsylvania car, but according to the plaintiff's story the drawbar of that car was too high to allow the connection, and when the cars came together it slid over the other one, and the plaintiff, who held the link, was crushed between the sills of the cars. The plaintiff was an experienced man, but testified that he could not have told the difference in height, or, it would seem, the alleged impossibility of the con-

nection, until the drawbars were close to each other. At the trial the judge directed a verdict for the defendant.

We are unable to see any ground on which the plaintiff could be allowed to recover. In *Lawless v. Connecticut River Railroad*, 136 Mass. 1, the defendant furnished a locomotive to be used as a switcher. The drawbar was too low for the cars with which it was expected to be used; the plaintiff did not know it, and was not called on to look out for it. In *Bowers v. Connecticut River Railroad*, 162 Mass. 812, there was some slight evidence that the drawbar was defective in having too much lateral play, and that the accident was due to that defect. In *Goodrich v. New York Central & Hudson River Railroad*, 116 N. Y. 398, there was no question that the injury was caused by a defect in the bumper. But such cases do not dispose of the present. It was lawful for the defendant to receive a car from another railroad, with a drawbar different in make and height from that which it used itself. It was lawful for it to couple such a car with its own. So far as appears, both cars were in proper condition. The difference in height was not a defect for which the defendant was answerable, either at common law or by statute. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687. The defendant was not called on to make preliminary measurements, and to warn the plaintiff of the possible difference before setting him to work. The possibility was obvious in a car coming from a different road. *Michigan Central Railroad v. Smithson*, 45 Mich. 212, 220. So far as appears, the cars might have been coupled successfully, if not with a straight link, then with a crooked one. It does not appear that the defendant failed to furnish whatever appliances were necessary to do the work. It was not the defendant's duty to see that the plaintiff or his fellow servants picked out suitable ones, if it furnished them. All that we can say is, that an experienced man was set to do a dangerous thing and met the consequences of failure. We cannot see evidence that the failure was due to the defendant's fault. See *Michigan Central Railroad v. Smithson*, 45 Mich. 212; *Fort Wayne, Jackson, & Saginaw Railroad v. Gildersleeve*, 33 Mich. 133; *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687; *Toledo, Wabash, & Western Railway v. Black*, 88 Ill. 112; *Baldwin v. Chicago, Rock Island, & Pacific Railway*, 50 Iowa, 680; *Hulett v. St. Louis, Kansas City, & Northern Railway*, 67 Mo. 239; *St. Louis, Iron Moun-*

tain, & Southern Railway v. Higgins, 44 Ark. 293; *McDonald v. Norfolk & Western Railroad*, 95 Va. 98; *Norfolk & Western Railroad v. Brown*, 91 Va. 668, 672; *Kohn v. McNulta*, 147 U. S. 238.

Judgment on the verdict.

JOHN AVERY & another *vs.* C. A. MONROE & others,
& trustee.

Worcester. October 7, 1898. — October 20, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

*Trustee Process — Attachment of Property conveyed to Assignee for
Benefit of Creditors.*

At the time of the service of a writ the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about taking possession of the property. No creditors had become parties to the deed. *Held*, that, the title having passed as between the parties to the deed, and the trustee having the right to the immediate possession, the property was "intrusted in the hands" of the trustee within the meaning of Pub. Sts. c. 183, § 21.

TRUSTEE PROCESS. The writ was dated March 27, 1896, and was served on the trustee on March 28, 1896. The conveyance referred to in the opinion was executed on March 25, 1896. *Dewey*, J. charged the trustee on his answers to the plaintiffs' interrogatories, and the trustee alleged exceptions. The facts appear in the opinion.

F. W. Blackmer & E. H. Vaughan, for the trustee, submitted the case on a brief.

A. A. Wyman, for the plaintiffs.

HOLMES, J. At the time of the service of the writ in this action the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about

taking possession of the property. No creditors appear to have become parties to the deed. The question before us is whether these facts warranted the Superior Court in charging the trustee.

The title had passed as between the parties to the deed. The trustee had the right to the immediate possession. We do not see why he was not as well "able to turn it out, to be disposed of on execution," (*Andrews v. Ludlow*, 5 Pick. 28, 31,) as if he had taken possession by a formal act. The case of *Viall v. Bliss*, 9 Pick. 13, seems probably to have been similar to this, and in Maine it seems settled that in cases like the present the trustee is to be charged. *Lane v. Nowell*, 15 Maine, 86. *Arnold v. Elwell*, 13 Maine, 261. *Peabody v. Maguire*, 79 Maine, 572, 584. *Glenn v. Boston & Sandwich Glass Co.* 7 Md. 287. See also *Mechanics' Savings Bank v. Waite*, 150 Mass. 234, 235; *Cushing, Trustee Process*, §§ 53-55; *Drake, Attachment*, (7th ed.) § 482; *Freeman, Executions*, (2d ed.) § 160. Section 26 of Pub. Sts. c. 183, is not intended to limit the liability of trustees under deeds like this to cases where they have taken possession, but simply to declare the existing law that they may be charged by trustee process under § 21. Rev. Sts. c. 109, § 35, Commissioners' note. We are of opinion that the property was "in-trusted in the hands" of the trustee within Pub. Sts. c. 183, § 21.

It is suggested that it does not appear from the trustee's answers to interrogatories that all the defendants had executed the deed before service of the writ. It does not appear that they had not. The deed was executed, and, if it be material, may be presumed to have been executed by all three of the defendants on the day of its date, as it certainly was by two of them.

Exceptions overruled.

WILLIAM FLAHERTY vs. NORWOOD ENGINEERING COMPANY.

Hampshire. September 20, 1898. — October 21, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Action — Law and Fact.

A., who was employed in an iron foundry as a moulder, was ordered with others to assist in pouring melted iron into a mould for a very large casting. The men stood on a platform two feet high built near the mould. The ladle, which was swung into position over the mould by a derrick, contained about two and one half tons of melted iron, which filled it more than one half. The arms of the ladle were attached a few inches below the centre of gravity, and a common round stick, furnished by the superintendent, without holes in it, was used as a lever, being placed over one handle and under the other handle of the arm on one side. This ladle was used infrequently, and A. had never seen it before. When the order was given to pour, the men began to tip the ladle, which overturned suddenly, emptying its contents on the floor, and the men jumped from the platform, and in the struggle to escape A. was thrown into the hot iron and injured. *Held*, in an action against his employer for his injury, that the case was rightly submitted to the jury.

TORT, for personal injuries sustained by the plaintiff, while employed in the defendant's iron foundry as a moulder, through the alleged negligence of the defendant. The declaration contained two counts, one at common law and the other under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Wardwell*, J., who allowed a bill of exceptions, in substance as follows.

The evidence tended to show the following facts. The plaintiff had been a moulder about twenty years, and had worked for the defendant about four or five months. For about a week before the accident, which occurred on December 14, 1895, two other employees, Healy and Knight, were working on and preparing to make an unusually large casting, with which the plaintiff had nothing to do. His work was on "light work" in another part of the room. This casting was to be made in the usual mould, which is prepared with a pattern, sand, etc. The flask containing the mould was made in halves to fit perfectly with each other, and fastened together with pins or clamps on the outside. On the top of the flask a pouring basin eight inches

deep was made with sand, from which basin one or two holes were made to the mould, through which the molten iron was to run from the basin into the mould. The flask when closed was about eight feet long, five feet wide, and four feet high. About fifteen feet from this flask in the same room was a stack or furnace from which the melted iron was taken for use in the foundry.

On this occasion an unusually large ladle was used, as the casting was to be very large. The ladle was about three and one half feet wide and three and three fourths feet high. The pot was circular in shape, and the ladle had two arms, which were permanently riveted to the pot. The bail or handle of the ladle was loosely attached to the arms close to the pot to enable the pot to be tipped from top to bottom, and when in use the upper part of the bail was attached to a derrick or crane. To make this particular casting it was necessary to change the bail from semicircular to square, so that the ladle could be raised sufficiently high to pour into the flask. On one side of the pot there was a peculiar lip through which the molten iron was intended to pass. On the bottom of the pot of the ladle on the opposite side from the lip there was a hook, attached to which was a chain, which was also attached to the joists of the floor above. This chain was used with a differential block. The derrick used to raise the ladle had two handles, and a man was stationed at each handle. Each arm of the ladle had two handles or shanks. The arms are the axis upon which the ladle is turned and moved when in use. On this particular ladle the arms were attached five inches below the centre of the pot, or the ladle was "hung" five inches below the centre of gravity. The ladle was set on the floor beside the flask, and men filled it with melted iron by taking the iron from the furnace in a small ladle and dumping it into the large one until it was from one half to two thirds full. There were nearly two and one half tons of metal in it. It was then attached by the bail to the derrick, and hoisted about four feet into place over the flask, and there left suspended while the men were being called to tip it into position for pouring. There was a platform about two feet high near the flask intended for the men to stand upon.

William A. Stevenson, superintendent of the works, and John E. Witherell, foreman of the room, neither of whom worked with

his hands, were both present and had charge of the work. Other men in the room, the plaintiff included, were ordered to come and assist in pouring from this ladle. The plaintiff with others responded, and he took the place assigned him on the platform. A common round stick, the stopping stick used for another and different purpose, was placed by the superintendent upon the handles at the end of one of the arms of the ladle, to be used as a lever. No instructions as to how this stick should be used were given by any one. The stick was over one shank and under the other, and had no holes in it. While the ladle was thus standing suspended men took hold of the handles, and five men, including the plaintiff, went to the arm of the ladle which had the stick, and by means of the stick they gradually tipped the ladle from perpendicular to an angle where the metal was near the lip preparatory to letting it pour out. When ready, some one gave the order to pour. The men began to tip the ladle more, and suddenly the ladle tipped over, bottom end up, and emptied its contents over the bare floor. The intense heat of this great mass cracked window glass and set the building on fire. The instant the ladle tipped over all the men who could do so ran away. The superintendent and foreman, with others, ran out of the building. The plaintiff jumped from the platform with the rest, and in doing so he came in contact with some others who were attempting to escape, and he was thrown into the hot iron, and received the injuries complained of.

The plaintiff had never seen the ladle before the time of the injury, and he did not know that there was anything wrong with the ladle or lever. This ladle was made by order of Stevenson, the superintendent, who was not a practical moulder. He testified as follows: "I gave orders how it was to be made. Mr. Witherell had his ideas and I had mine, and between us and the foreman of the machine shop we had it made."

The plaintiff testified in relation to the accident as follows: "I stood on the platform and took hold of the lever and helped get the ladle into position. . . . I had hold of the lever and assisted in getting it into position so we could turn the iron into the mould. We got the ladle into position, and as soon as it was in position it hung there for a second or so, and Knight said to one of the men on the other end of the lever that if we did n't

pour it soon the iron would freeze, and Mr. Stevenson said, 'Go ahead, then.' Then we started to pour the iron into the mould, and as soon as that went in, that is, into the basin that receives the iron, she tipped right over. The first I heard then was Healey said, 'She is going,' and I tried to escape; in fact we all jumped, and some of the men in the struggle knocked me on the shoulder and threw me into the iron."

Several witnesses for the plaintiff testified that the ladle was dangerous and unfit for use, because the arms were attached below the centre of gravity; and witnesses for the defendant testified to the contrary.

The plaintiff testified that the order to pour was given by the superintendent, who denied it. Another witness testified that the foreman gave the order. Two other witnesses testified that "somebody gave the order to pour"; and still another witness testified that the order was given by Knight. There was also testimony to the effect that the lever used was not a proper one; and that the modern custom in foundries was to have a gear attached to a shaft and a "worm" for tipping large ladles, and a lever with two holes in it to fit on each one of the shanks.

The plaintiff testified that this ladle had not been used before while he was there. The defendant's superintendent testified as follows: "The ladle had been used before since I had been there, always with more iron in it than it had this time. We considered it a safe and suitable ladle. We had no trouble with it before. We used it in the same manner before that it was used this time. We were using it that way all the time I was there. It was more safe with the half load than when it was full. . . . This lever was for no other purpose than a brake. This ladle was only used as we had an order for a piece that required that sized ladle."

Another witness, who had worked for the defendant eight years, testified that he had seen this ladle used two or three times during that period with more in it than on this occasion; and that "on the first occasion the pouring was done in the same way," and "this system had been used right along with the ladle in that foundry."

After the testimony was all in, the defendant requested a ruling that there was no sufficient evidence to entitle the plaintiff to

have the case submitted to the jury. This request was refused; and the defendant excepted.

The defendant asked the judge to instruct the jury that, "if the plaintiff would not have received the burns if he had remained on the platform where he was standing to assist in operating the lever, and if he received the burns because he fell, or was pushed or thrown to the ground in running away from his said post, the defendant is not responsible for the burns he received by his being so on the ground."

The judge declined to give this instruction, and instructed the jury, in substance, that the plaintiff's act in leaving the platform was for them to consider, with all the other evidence in the case, as bearing on the question of the plaintiff's care; that it was for them to say whether, under all the circumstances that surrounded the plaintiff, there was any lack of due care on his part in leaving the platform which contributed to his injury; that, if there was such lack of due care, the plaintiff was not entitled to recover; and that he must show affirmatively that he was using proper care in this as in all other respects; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. G. Bassett & J. M. B. Churchill, for the defendant.

J. B. O'Donnell, for the plaintiff.

HAMMOND, J. Considering among other things shown by the evidence the dangerous character of the molten iron, what was to be done with it, the nature of the appliances to be used in handling it, the infrequency of their use, the degree of knowledge of the plaintiff and the general scope of his duties, we are of opinion that the questions whether the plaintiff was in the exercise of due care, whether the appliances were reasonably safe and proper, whether there was any negligence on the part of the defendant as to those appliances, and whether the plaintiff knew and appreciated, or ought to have known and appreciated the danger, were all questions of fact for the jury.

Exceptions overruled.

JOSEPH TULEJA vs. TREFLE BEAUVAIS, JR., & another.

Hampden. September 27, 1898. — October 21, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Equity — Decree not justified by Record — Clerical Error.

Where, on an appeal from a decree of the Superior Court after a hearing on a bill in equity praying that the defendant be enjoined from maintaining a fence across a certain street and in front of the premises of the plaintiff, the evidence is not reported, that part of the decree which is not justified by the record will be stricken out; and the contention of the defendant that in any event the decree is wrong because the bill states the frontage of the defendant's lot to be two hundred and seventy-four feet, while the decree seems to fix it at one hundred and seventy-four, cannot avail, because, the evidence not being reported, it is impossible to tell which is correct. If the error, if there be any, be merely clerical, it can be corrected.

BILL IN EQUITY, filed in the Superior Court, to restrain the defendants, Trefle Beauvais, Jr., and Marie D. Beauvais, from maintaining a certain fence across Leary Street, so called, and in front of the premises of the plaintiff, in Chicopee.

The bill alleged that the plaintiff was the owner of a certain parcel of land on the westerly side of Grattan Street, in said Chicopee, described as follows: "Beginning on the westerly side of said Grattan Street at the northwest corner of land of Leo Blanchard, thence running westerly on said Blanchard's land 205 feet to an iron pin at land of one Buckley; thence running westerly on said land of Buckley 360 feet to a point at land of the heirs of P. Leary; thence northerly on last named land 242 feet to a new street called Leary Street; thence easterly on the southerly line of said Leary Street 395½ feet to the westerly side of said Grattan Street; and thence southerly on said Grattan Street 143½ feet to the point of beginning, with the right to use said Leary Street as laid out 33 feet wide for travel"; — that Leary Street had been open and used by the public generally for a period of more than twenty years, and had become a public highway by prescription; that the defendants were the owners of a certain parcel of land on the other side of Grattan Street, described as follows: "Commencing at a stone on the west side

of the highway leading from Chicopee Falls to Holyoke Ferry and at the northeast corner of the lot herein described, and from thence running westerly by land of the heirs of Thaddeus Chapin 248½ feet to a stone; thence running southerly by land of the heirs of Patrick Leary to land laid out by Morris Leary for a street 119 feet; thence running easterly by land reserved by said Morris Leary for a street 368½ feet to a stone on the mentioned highway; thence running northerly on said highway 274 feet to the place of beginning; also the right of passage with or without teams through a strip of land two rods in width on the south side of the above described premises in common with the said Morris Leary and the heirs of Patrick Leary"; the defendants becoming the owners of the premises by deed of Morris Leary, who was the husband of Ellen Leary, by whose deed the plaintiff became the owner of the premises above described;—that on or about April 1, 1897, the defendants erected a certain fence about five feet in height, beginning at a point at the corner of Grattan and Leary Streets, and extending across Leary Street at its junction with Grattan Street and for a considerable distance farther along Grattan Street upon the premises of the plaintiff; that the said fence entirely prevented access to and exit from Leary Street to Grattan Street, and prevented the use of the plaintiff's other property, and entirely prevented the use of Leary Street by the plaintiff, there being no other outlet from Leary Street except Grattan Street; and that on April 21, 1897, the plaintiff having torn down the fence, the defendants immediately replaced the same.

A decree was to be entered "that an injunction issue restraining the defendants from further maintaining the fence mentioned in the bill of complaint, or any part thereof, and from erecting or maintaining any obstruction upon the land of the plaintiff along the highway line of Grattan Street in Chicopee, in said county, south of a certain road or street, two rods in width more or less, originally laid out by one Morris Leary, and afterwards improved by Trefle Beauvais, Senior, said road or street being commonly known as Leary Street, the northerly line of said Leary Street at the point where it intersects said Grattan Street being distant one hundred and seventy-four (174) feet from the northeasterly corner of the land of the defendant, Marie D. Beau-

vais ; and further restraining the defendants from entering or trespassing upon any portion of the tract of land on said Grattan Street, which lies southerly of said Leary Street, and from hindering, preventing, or obstructing the free use of said Leary Street for all purposes of passage on foot and with vehicles by the plaintiff."

The defendants appealed to this court.

J. T. Moriarty & T. FitzGibbon, for the defendants.

J. B. Carroll & W. H. McClintock, (*J. F. Stapleton, Jr.* with them,) for the plaintiff.

HAMMOND, J. This case is before us upon an appeal from the decree of the Superior Court, after a hearing. The evidence not being reported, the only question is whether the decree is justified by the record.

Upon comparing the decree with the record, we are of opinion that the second paragraph of the decree, to wit, that part after "Marie D. Beauvais," and before the paragraph relating to costs, is not justified by the record, and should be stricken out.

The decree as thus modified may stand.

The defendants contend that in any event the decree is wrong, because the bill states the frontage of the Beauvais lot to be two hundred and seventy-four feet, while the decree seems to fix it at one hundred and seventy-four feet. But the evidence not being reported, we cannot tell which is correct. Perhaps the error, if there be any, is merely clerical. If so, it can be corrected.

Decree accordingly.

ADOLPH F. CARLSON, administrator, vs. METROPOLITAN
LIFE INSURANCE COMPANY.

Hampden. September 27, 1898. — October 21, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Policy of Life Insurance — Waiver — Authority of Agent — Ratification
— Estoppel.*

The willingness, expressed by a life insurance company in a letter written by its secretary, to consider whether upon investigation it would waive any right to a requirement of a policy that "no suit shall be brought" under it "after six months from the date of death of the insured," falls far short of a waiver; and this applies to the subsequent investigation.

There is no waiver of a requirement of a policy of life insurance that "no suit shall be brought" under it "after six months from the date of death of the insured" by an agent who, by the express terms of the contract, has not the power to vary its terms or to waive forfeitures, there being no evidence that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions, that the insured was justified in believing that he had such authority.

In an action on a policy of life insurance the contention of the administrator of the insured that, relying upon the statement of an agent of the company that the claim had been paid, he was induced to postpone his action until after the expiration of the period during which only the contract provided that action could be brought, and that therefore the company was estopped from setting up this defence, cannot avail, if it does not appear that the agent was authorized by the company to make such statement, that the company ever ratified it or even knew that it had been made, and if it was not made within the scope of his authority real or apparent.

CONTRACT on a policy of insurance on the life of Sophia W. Carlson for the benefit of her husband, Carl Axel Carlson. The writ was dated August 11, 1896, and the insured died at Stockholm, in Sweden, October 2, 1894. Trial in the Superior Court, before *Blodgett*, J., who, at the close of the testimony for the plaintiff, ruled, at the request of the defendant, that the provision in the policy requiring the action to be brought within six months from the death of the insured was a bar to the action, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

T. B. O'Donnell, (*R. A. Allyn* with him,) for the plaintiff.

E. H. Lathrop, for the defendant.

HAMMOND, J. The seventh condition of this contract, so far as material, is as follows: "No suit shall be brought against this company under this policy . . . after six months from the date of death of the insured. If any such suit be commenced after said six months, the lapse of time shall be taken to be conclusive evidence against any claim, the provisions of any and all statutes of limitation to the contrary notwithstanding." Since the suit was not brought within the time therein named, this condition furnishes a complete defence, unless by waiver or in some other way the defendant has lost the right to stand upon it; and the burden is on the plaintiff to show that the right has been thus lost.

The first contention of the plaintiff is that this provision has been waived. In support of this he relies upon the letter of May 27, 1895, from the defendant's secretary to one Dr. Maryott, the subsequent action of the defendant in investigating the case, and the conduct and statements of one McLaughlin. Neither the letter nor the investigation therein foreshadowed can be regarded as evidence of waiver. The letter states that the defendant has not been "able to look at it as you do"; that it sees "no reason for changing our view"; and closes by saying, "This is given to you without prejudice to our interests in any way."

The intention to stand upon all its rights is plainly stated, and the most favorable view for the plaintiff is that the defendant was willing to consider whether upon further investigation it would waive any right; but such a willingness falls far short of an actual waiver.

The same reasons apply to the subsequent investigation. It must be considered on the evidence as undertaken and conducted under the terms stated in the letter,—"without prejudice to [defendant's] interests in any way."

Nor is there any sufficient evidence of waiver to be found in the conduct and statements of McLaughlin.

The fifth condition of the contract is as follows: "The contract between the parties hereto is completely set forth in this policy, and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived, except by an agreement in writing signed by one of the following officers, namely, the President, Vice-President, Secretary, Assist-

ant Secretary, and Actuary, whose authority for this purpose will not be delegated; no other person has or will be given authority. Therefore agents (which term includes superintendents and assistant superintendents) are not authorized and have no power to make, alter, or discharge contracts, or waive forfeitures," etc. McLaughlin was not one of the officers to whom by this provision the power was given to vary or modify the contract or to waive forfeitures. There was evidence tending to show that he "was supervising agent of the office of the defendant corporation in Hampden County, and had special charge of the Springfield office of the company, and that he was superintendent of the Springfield office." The contract provides that such a superintendent shall not have the power to waive.

By the express terms of the contract, McLaughlin, being a superintendent, had not the power to vary the terms of the contract or to waive forfeitures. There is no evidence that he had been held out by the defendant as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions, that the insured was justified in believing that he had such authority. *Kyte v. Commercial Union Assurance Co.* 144 Mass. 43, 46.

"The failure to perform a condition of a contract the performance of which is essential to the continuance of the contract cannot be waived by an agent when the contract itself declares that he shall not have power to waive it, or that only certain officers which do not include him shall have such power, unless after the contract was made, authority had been given to the agent to waive the condition, or the company has knowingly permitted him to waive such condition." *Porter v. United States Ins. Co.* 160 Mass. 183, and cases therein cited.

The plaintiff, however, contends that, even if there has not been any waiver, still he and Maryott were told by McLaughlin that the claim had been paid, that at that time McLaughlin was an agent of the company, and that, relying upon the statements so made, he was induced to postpone his suit until after the six months; and he says that the defendant is thereby estopped from setting up this defence.*

* The plaintiff testified that McLaughlin told him on or about February 1, 1895, and in the last of March or on April 1, 1895, that the claim had

In support of this contention he relies upon *Jennings v. Metropolitan Ins. Co.* 148 Mass. 61. That case, however, is distinguishable from the one at the bar in many material respects, both as to the form of the contract and the power of the agent, and it is unnecessary to set them out in detail.

It does not appear that McLaughlin was authorized by the defendant to make any such statements, that the defendant ever ratified any such statements, or even knew that any of them had been made; nor were they made within the scope of his authority, real or apparent.

Exceptions overruled.

RANSOM C. TAYLOR vs. ALBERT TUSON.

Worcester. October 3, 1898. — October 21, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Landlord and Tenant — Notice of Termination of Tenancy at Will — Action.

If a tenant at will does not give a proper and legal notice sufficient to determine the tenancy, and the landlord does not accept the surrender of the premises, the tenancy is not determined by the tenant vacating the premises.

CONTRACT, for use and occupation of an office in Worcester, for four months' rent from December 24, 1896, to April 24, 1897, the rent being fifteen dollars per month and payable monthly on the 24th day of each month. At the trial in the Superior Court, before *Gaskill, J.*, it appeared that the defendant moved his property from the premises on December 24, 1896, and tendered the keys, which the plaintiff refused to accept. The plaintiff told the defendant that he should hold him for the rent, and the defendant left the keys and went away. The defendant testified that on November 24, 1896, he gave to the plaintiff a notice in writing that he should vacate the premises on December 24, 1896, all of which the plaintiff denied.

been paid, and that it was for this reason that he had not been appointed administrator earlier. The testimony of Maryott as to McLaughlin's statement was to the same effect.

The defendant, who was a tenant at will, requested the judge to rule, as matter of law, that if, paying rent by the month, the rent period being a month in time, he vacated the premises, without giving a proper and legal notice sufficient to terminate said tenancy, he could be held liable to pay rent only for the month, or rent period, during which he vacated the premises, and for the next succeeding month or rent period.

The judge refused so to rule, and ruled that if the defendant gave the notice which he claimed to have given the plaintiff, the notice was sufficient to terminate the tenancy, and the plaintiff could not recover; but if the defendant did not give the notice as claimed by the defendant, then the tenancy at will had not been terminated, and the plaintiff could recover the four months' rent sued for.

The jury returned a verdict for the plaintiff for the four months' rent, namely, sixty dollars and interest thereon; and the defendant alleged exceptions.

W. E. Sibley, for the defendant.

J. E. Sullivan & D. F. O'Connell, (*D. B. Hubbard* with them,) for the plaintiff.

FIELD, C. J. The defendant was a tenant at will of the plaintiff. The presiding justice rightly ruled that if the tenant did not give "a proper and legal notice sufficient to terminate said tenancy," as the plaintiff did not accept the surrender of the premises, the tenancy at will was not determined by the tenant vacating the premises. *Walker v. Furbush*, 11 Cush. 366. *Batchelder v. Batchelder*, 2 Allen, 105. *Whicher v. Cottrell*, 165 Mass. 351. Pub. Sts. c. 121, § 12.

Exceptions overruled.

PETER LAHTI vs. FITCHBURG AND LEOMINSTER STREET
RAILWAY COMPANY.

Worcester. October 4, 1898. — October 21, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Due Care.

At the trial of an action for personal injuries occasioned to the plaintiff by the collision of the wagon in which he was riding with an electric car of the defendant at the point of intersection of M. and P. Streets, the former of which ran east and west and the latter north and south, it appeared that the car was going slowly; that the plaintiff was nearly across the track at the time of the collision; that there was a high board fence on the southerly side of M. Street at its junction with P. Street, which was an obstruction to the plaintiff's westerly view of M. Street until he reached a point fifteen feet southerly of the south rail of the railway track in that street; that he looked up M. Street and saw nothing; that he heard no gong or bell; that he was going "a little faster than a walk," and "slowed up a little before he got on to the track"; and that "when he got on to the track he hurried up his horse." *Held*, that there was evidence for the jury that the plaintiff was in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff by a collision between a baker's cart driven by him and an electric car of the defendant. At the trial in the Superior Court, before *Hopkins, J.*, there was evidence tending to show that the collision occurred on April 27, 1897, at about 5.45 o'clock P. M., in Fitchburg, at the point of intersection of Main Street with Putnam Street; that Main Street runs east and west; that Putnam Street runs north and south; that the two meet at right angles; that the track of the defendant was laid in the centre of Main Street; that at the time of the collision the plaintiff was driving from Putnam Street northerly across Main Street, and the electric car of the defendant was proceeding easterly on Main Street; that a new building was in process of erection on the southerly side of Main Street and westerly side of Putnam Street, and that there was a high board fence on the southerly side of Main Street; that the distance from the track to the curbing was 15.7 feet, and this fence was erected in the street at a distance, according to the testimony of various witnesses, of from 10 feet to 13½ feet from the track; that to any one approaching Main Street from Putnam street this fence was

an obstruction to the westerly view of Main Street, but that at a point 15 feet southerly from the south rail of the railway track in the line of travel from Putnam Street to Main Street there was a view westerly upon the street railway track for a distance of 349 feet; and that this view of the track increased in distance as the track was approached, and that view of the track decreased rapidly as the point of observation was removed beyond a distance of 15 feet.

The plaintiff testified that he was driving a four-wheeled baker's cart, which was covered on all four sides and on the top with wood or canvas, except the glass windows hereinafter mentioned; that it had a door on each side opening between the front and rear wheels, and a seat inside extending across the cart; that he was sitting on the seat and driving with a rein in each hand; that the doors were closed; that in front of him was a counter three feet high, and above the counter at the front end of the cart and four feet from his seat was a glass window; that as he sat on the seat the top of the cart was two feet above the top of his head; that the side doors extended to the top of the cart and were of wood, with a glass window nine to sixteen inches wide at the top; that the reins ran through holes at the top of the glass window in front; that when he came into Main Street he looked up the street and saw nothing; that he could see but a very little distance because the fence referred to was in his way; that after he looked up the street, he looked easterly down Main Street, and then looked round; that he first looked through the front and then through the glass inside doors, and saw nothing; that he was driving across Main Street when the car struck the wagon; that he did not hear any gong or bell; that he was going a little faster than a walk; that he slowed up a little before he got on to the track; that when he got on to the track he hurried up his horse; and that he had driven over these streets many times, and at this time was driving in the centre of Putnam Street.

Other witnesses testified that the car approached the point of collision at a very slow rate of speed, and all the evidence was uncontroverted that the car stopped within one or two feet from the point of collision. There was evidence, and the plaintiff's counsel contended, that by reason of the slow rate of speed at

which the car was running the motorman had full control of the car, and ought to have stopped it before the collision.

One Hurley, who was a passenger on the car, testified that he first saw the cart at the moment of collision, and that his attention was attracted to it at that moment either by the bell or by the fact that the brakes were applied.

At the conclusion of the evidence the defendant asked the judge to rule that there was not sufficient evidence that the plaintiff was in the exercise of due care to warrant a verdict for the plaintiff. The judge refused so to rule, and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. F. Baker, for the defendant.

J. E. McConnell, for the plaintiff.

FIELD, C. J. The single question in this case is whether there was evidence for the jury that the plaintiff was in the exercise of due care. We think that there was. There was evidence that the car was going at a slow rate, that the plaintiff was nearly across the track at the time of the collision, that there was a high board fence on the southerly side of Main Street at its junction with Putnam Street which was an obstruction to the plaintiff's westerly view of Main Street until he reached a point fifteen feet southerly of the south rail of the railway track in that street, that the plaintiff looked up Main Street and saw nothing, that he heard no gong or bell, that he was going "a little faster than a walk," and "slowed up a little before he got on to the track," and that "when he got on to the track he hurried up his horse." We think this was evidence of the plaintiff's due care, to be submitted to the jury. *Driscoll v. West End Street Railway*, 159 Mass. 142. *Robbins v. Springfield Street Railway*, 165 Mass. 30. *White v. Worcester Consolidated Street Railway*, 167 Mass. 43.

Exceptions overruled.

JAMES TRIMBLE vs. WHITIN MACHINE WORKS.

Worcester. October 6, 1898. — October 21, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

*Personal Injuries — Master and Servant — Employers' Liability Act
— Negligence — Action.*

An action for personal injuries sustained by the plaintiff, while helping to load a machine upon a car, by falling through the side doorway of the car, cannot be maintained on the ground that there was no gang-plank at that door, if, assuming that a gang-plank is a part of the "ways, works, or machinery" of the employer, within St. 1887, c. 270, there is nothing to show that he had not furnished a suitable gang-plank, and if, it being the duty either of the plaintiff and his fellow workmen to put the gang-plank in place, or of the defendant's foreman to see to it, there is nothing to show whether the sole or principal duty of the latter was that of superintendence, or whether it was a part of his duty to see that the gang-plank was in place while the men were loading the machine.

TORT, for personal injuries sustained by the plaintiff, while in the employ of the defendant, through the alleged negligence of the latter in not providing a gang-plank for use in loading machinery. The declaration contained three counts, two under the employers' liability act, St. 1887, c. 270, and one at common law.

Trial in the Superior Court, before *Bond, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that previously to the accident he had been at work for fourteen months for the defendant loading machinery into cars; that on the day of the accident he was engaged with five other men in loading a machine known as a "quiller" into a box car through the end door; that this quiller was a machine eleven or twelve feet long, about five feet wide, and about five feet high, and weighing about 3,000 pounds; that it was loaded on two trucks, one at the front of the machine and another at the rear, each truck consisting of two wheels and a handle; and that the quiller rested upon an upright pin which held it upon the truck.

He further described the machine as follows:

"The quiller was top heavy and was not symmetrical and did not balance even. The greater part of the weight at the top

was on my side, so that the machine would easily tip towards me. We got it into the freight shed and around to the door, and the first part of it went in, and I was ordered to get my bar and balance the machine, and I got my bar and went along the side of the car, the same as though right in the centre, and it was just about eighteen inches. I do not believe there was eighteen inches to work between the car and the machine. Two of the men were right behind me on the side, and three of them on the forward part, and I was in the centre balancing the quiller with my bar. I had not the chance to turn round and watch, because it might come over up against the car and pin me there, and I was going along with it keeping it right. The car was about seven feet wide. When I was told by the foreman to pinch this along on the south side, I got my bar under it and threw my force as it was a pretty heavy machine, and I lifted on the machine like that; my bar slipped on the hard wood floor and the machine tipped towards me and the heft of the machine threw me back, and I stepped right back, and there was nothing left behind me but an open door; there was no gang-plank, and I went through that doorway on the side of the car down between the platform and the car and struck on two rails."

On cross-examination, the plaintiff further testified as follows :

"The shed is a covered shed and the cars run under, really a part of the building. The cars ran into the freight-house which was heated and warm, and lighted by arc lights at the other end and by movable incandescent lights which you could carry from one side to the other. One of these incandescent lights was taken into the car and hung generally on a nail driven in the side of the car out of the way of the machinery and of one's head. The only way to take a light was through the side door. Mr. Cram gave orders to open the doors that morning. The doors were not always open in those cars. I did not open those doors, and no one of the six men opened them. Some one opened the side door. Whenever they loaded through the end doors they opened the doors on the platform side. They opened the end door and they kept the side door shut. They opened the side door for ventilation, but whenever they did, they put on a gang-plank. They always put a gang-plank at the side door

while loading at the end door. I did not know this door was open. Of course I was watching the machine. If I did know the side door was open, I thought they might protect it as they always did with the gang-plank. I did not have a chance to look round. I was working about fifteen or twenty minutes on the same side as this door and going along with my back to it; was balancing the machine right along and trying to move it a little bit towards the other side of the car, according to orders. Of course I knew the door was there, but I did not know the plank was off."

John C. Maloney testified that he was one of the men who were helping load this machine, and that he was working on the same side as that on which the plaintiff worked. His testimony in regard to the machine and location of the plaintiff in the car coincided with that of the plaintiff. He further testified: "We ran the quiller into the car and got abreast of the door. There was a space of twelve to eighteen inches between the machine and the side of the car where the plaintiff was. We got the machine into the middle of the car, and one man asked the foreman, 'Will we leave it down here?' Mr. Cram, the foreman, said, 'No, pinch it up to the south side of the car.' The plaintiff pinched the machine, and his bar slipped and the machine tipped over against him and threw him back. When he put his foot behind him there was no gang-plank and he fell. There always used to be a gang-plank at the side door when we loaded at the end."

On cross-examination, he testified: "They always opened the side door to that car when they loaded through the end door, so that they could get some air, as it is pretty close and stuffy when the car has been shut up all night. They always leave open those side doors. When loading through the end door they put a gang-plank at the end door for the purpose of taking the machinery in. There was always a gang-plank at the side door when it was open."

At the close of the evidence offered by the plaintiff, the judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. W. Sheehan & L. Cutting, for the plaintiff.

W. S. B. Hopkins & F. B. Smith, for the defendant.

MORTON, J. We understand that the only defect complained of was the want of a gang-plank at the side door of the car, while the plaintiff was helping to load the machine. If we assume, without deciding, that a gang-plank was a part of the "ways, works, or machinery," there is nothing to show that the defendant had not furnished a suitable gang-plank. If the defendant furnished a suitable gang-plank, it was not bound to see that it was properly placed at the door while the men were putting the machine into the car. It would have performed its duty in furnishing the gang-plank. *Robinson v. Blake Manuf. Co.* 148 Mass. 528. *Ashley v. Hart*, 147 Mass. 578. *Thyng v. Fitchburg Railroad*, 156 Mass. 18. *Carroll v. Western Union Telegraph Co.* 160 Mass. 152. *Allen v. Smith Iron Co.* 160 Mass. 557. Under the circumstances indicated, the putting of the gang-plank in place was the work of the men themselves, or it belonged to some superintendent or foreman of the defendant to see to it. If it was the former, then it is clear that the defendant is not liable to the plaintiff for an injury occurring through the failure or neglect of the plaintiff or his fellow workmen to do something which he or they ought to have done. Nobody is referred to in the exceptions as superintendent, and the only person who is referred to in them as a foreman is Cram. But there is nothing to show whether his sole or principal duty was that of superintendence, or whether it was a part of his duty to see that the gang-plank was in place at the side door of the car while the men were loading the machine. It does not even clearly appear that he was a foreman of the defendant, though perhaps that might be fairly presumed. Therefore, even though we make in the plaintiff's favor the assumption which we have made, he fails on this branch of the case.

The result is that the exceptions must be overruled.

So ordered.

**BERGNER AND ENGEL BREWING COMPANY vs. ARTHUR
DREYFUS.**

Suffolk. March 8, 1898. — October 28, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Discharge in Insolvency not a Bar to an Action.

A corporation of another State, having its main establishment there, is not affected by a discharge here of a Massachusetts debtor, although the corporation has a place of business here and a license under Pub. Sts. c. 100, § 10, and has appointed the commissioner of corporations its attorney for service of process under St. 1884, c. 380, § 1. FIELD, C. J. dissenting.

CONTRACT for beer and ale sold and delivered to the defendant. Writ dated September 30, 1896. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

The plaintiff during all the time of the transactions involved in the action was a corporation organized under the laws of Pennsylvania. It never held a charter from this Commonwealth, and had always complied with the laws of this Commonwealth regulating foreign corporations doing business here. Its business was the manufacturing and selling malt and malt liquors. Its principal offices, where its meetings were held and its books kept, were in Philadelphia, where its brewery also was; and it manufactured nothing in this Commonwealth. It sold its products at wholesale in this Commonwealth, and for that purpose hired in its own name on Atlantic Avenue, Boston, premises where it had an office and storage room, sufficient to hold beer and ale for its daily business. It owned and maintained on the premises a complete set of office furniture. It also owned and maintained in Boston horses and wagons sufficient to deliver most of the goods which it sold in that city. It received from the board of police of the city of Boston a license in its name, of the fourth class, to sell intoxicating liquors in that city as a wholesale dealer, and it hired an agent styled a "manager," a bookkeeper, and delivery men for the conduct of its business in Boston. It sent from Philadelphia all books used

at the office in Boston, and kept its accounts of the business which it did in Boston as follows.

The bills of lading of all goods sent to Boston were made out to "Sol. Bacharach, Manager, N. E. Depot." An invoice was made out to "The New England Depot," charging the goods at a certain price; but the manager was in no way liable to the plaintiff for the goods so sent, and never had title to them in any way. All sales made in Boston were entered by the Boston bookkeeper under a heading in this form: "A. B., in account with Bergner & Engel Brewing Co., N. E. Depot." A weekly statement of the account with each customer, and of the general business of the N. E. Depot, was rendered to the main office of the company in Philadelphia.

The beer and ale for which the plaintiff sought to recover were ordered by the defendant at the above described Boston office of the manager or other employees, all of whom resided in this Commonwealth, and were delivered from there in the plaintiff's wagons to the defendant at his restaurant in Boston.

Thereafter, the defendant, who was a citizen of this Commonwealth, filed a voluntary petition in insolvency in Suffolk County. He received his discharge before this action was brought. The plaintiff did not prove its claim in those proceedings, and has never received payment of any part thereof.

If the action was barred, judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiff for \$554.23, with interest from November 13, 1896, and costs.

B. S. Ladd, (*T. F. Strange* with him,) for the defendant.

H. H. Baker, for the plaintiff.

HOLMES, J. This is a suit by a Pennsylvania corporation to recover a debt for goods sold and delivered here. The only defence is a discharge in insolvency under our statutes, which of course commonly is no defence at all. This was reaffirmed unanimously in 1890, after full consideration of the objections now urged, and it was decided, also, not for the first time, that the general language of the insolvent law was not intended to affect access to Massachusetts courts by a local rule of procedure unless the substantive right was barred by the discharge. *Phoenix National Bank v. Batcheller*, 151 Mass. 589. The grounds urged for an exception in the present case are that the

plaintiff, although its brewery and main offices are in Pennsylvania, has an office in Boston and maintains here a complete outfit for the distribution of its products, that it has a license of the fourth class under Pub. Sts. c. 100, § 10, and that it has complied with the laws regulating foreign corporations doing business here, including, we assume, that which requires the appointment of the commissioner of corporations its "attorney upon whom all lawful processes in any action or proceeding against it may be served." St. 1884, c. 330, § 1. See St. 1895, c. 157.

We are of opinion that these facts are not enough to bring the plaintiff under the operation of the State insolvent law. It is settled that doing business here does not have that effect upon a citizen or corporation of another State. *Guernsey v. Wood*, 130 Mass. 503. *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. It is not pointed out what the license, whether valid or void, has to do with the matter, and we do not perceive that complying with the laws concerning foreign corporations ought to have any greater effect. We think it plain that the words just quoted from St. 1884, c. 330, § 1, do not mean that, by appointing the commissioner of corporations their attorney, foreign corporations agree not only that publication of notice in insolvency proceedings shall have the effect of personal service upon them in an action, but also that, as a result, they shall be subject to the jurisdiction of the State insolvency proceedings so as to be bound by a discharge.

The most that could be deduced from the appointment would be that, if on other grounds a foreign corporation were subject to the operation of the insolvent law, publication of notice should have the same effect upon it as upon other creditors in making it a party to the proceedings. But we do not suppose that it would be suggested that a natural person, a creditor who was a citizen of another State, lost his immunity and became a party to the proceedings merely by his accidental presence in the Commonwealth at the moment when the notice appeared. *Olivieri v. Atkinson*, 168 Mass. 28. No greater direct effect than the actual presence of a natural person can be attributed to the presence of an attorney authorized to receive service of process. Furthermore, we doubt whether the

act of 1884 purports to give the appointment even so much effect as that. The language discloses no thought about insolvent proceedings, and when at a later date it was decided to make foreign corporations subject to be put into insolvency here, it was thought proper to provide expressly that service upon the commissioner of corporations should be a sufficient notice to the corporation of the presentment of the petition by creditors against it. St. 1890, c. 321, § 1. If the act of 1884 attempted to do more than we have construed it to attempt, its validity might be drawn in doubt as requiring the corporation to surrender a privilege secured to it by the Constitution and laws of the United States. *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207.

The independent ground on which it is urged that the plaintiff is subject to the insolvent law in the present case is that the plaintiff is domesticated in this State, as shown by the facts above recited, of which the appointment of an attorney is only one. The word "domesticated," which was used in the argument for the defendant, presents no definite legal conception which has any bearing upon the case. We presume that it was intended to convey in a conciliatory form the notion that the plaintiff was domiciled here, — "resident," in the language of Pub. Sts. c. 157, § 81, — and therefore barred by the language and legal operation of the act. It could not be contended that the corporation was a citizen of Massachusetts. In such sense as it is a citizen of any State, it is a citizen of the State which creates it and of no other. But there are even greater objections to a double domicile than there are to double citizenship. Under the law as it has been, a man might find himself owing a double allegiance without any choice of his own. But domicile, at least for any given purpose, is single by its essence. Dicey, *Confl. of Laws*, 95. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice or on technical grounds of birth or creation, has a domicile in one place, it cannot have one elsewhere, because what the law means by domicile is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is

settled that a corporation has its domicile in the jurisdiction of the State which created it, and as a consequence that it has not a domicile anywhere else. *Boston Investment Co. v. Boston*, 158 Mass. 461, 462, 463. *Shaw v. Quincy Mining Co.* 145 U. S. 444, 450. *Martine v. International Ins. Co.* 53 N. Y. 339, 346. The so called modifications of this rule by statutes like the act of 1884 do not modify it because jurisdiction of the ordinary personal actions does not depend upon domicile, but only upon such presence within the jurisdiction as to make service possible. See *In re Hohorst*, 150 U. S. 653. But the operation of our insolvent law by its very terms may, and in this case does, depend upon the domicile of the creditor, and as there can be no doubt either in fact or in law that the plaintiff was domiciled in Pennsylvania in such a sense that a statute like Pub. Sts. c. 157, § 81, would hit it there, it cannot have been domiciled here for the same purpose at the same time.

Judgment for the plaintiff affirmed.

FIELD, C. J. The defendant, who is and was a citizen of Massachusetts, filed a voluntary petition in insolvency in the Court of Insolvency for the county of Suffolk, on which he was adjudged an insolvent debtor, and, due proceedings being had, he received his discharge. The plaintiff is a corporation organized under the laws of Pennsylvania; its principal offices are in Philadelphia, and it manufactures and sells malt liquors. It has complied with the statutes of this Commonwealth regulating foreign corporations having a usual place of business in the Commonwealth, and it has an office and store-room in Boston, which it hires in its own name, where it sells its products at wholesale. It hires an agent, styled a manager, a bookkeeper, and delivery men for the conduct of its business in Boston, and it owns there a complete set of office furniture and horses and wagons sufficient for the delivery of the goods which it sells in Boston. All these employees reside in this Commonwealth. It received from the board of police of the city of Boston a license in its name, of the fourth class, to sell intoxicating liquors in that city as a wholesale dealer.

The defendant ordered of the plaintiff, at its office in Boston, beer and ale, which were delivered to him in Boston from the

plaintiff's store-room there, and some time after this purchase was made and the goods delivered the defendant filed his petition in insolvency. The plaintiff did not prove its claim in the proceedings in insolvency, and now contends in this action that the discharge is not a bar, because it is a citizen of the State of Pennsylvania.

There is no doubt that the words of the statutes relating to discharges in insolvency, as well as the words of the discharge itself, purport to make the discharge pleaded in the present action a bar to the action. Section 81 of the Pub. Sts. c. 157, provides that the debtor upon obtaining his discharge shall be absolutely discharged from all provable debts founded "on any contract made by him subsequently to the last day of July in the year eighteen hundred and thirty-eight, and while an inhabitant of this State, if made within this State, to be performed within the same, or due to any person resident therein at the time of the first publication of the notice of the issuing of the warrant." The contract sued on was made while the defendant was an inhabitant of this State, and was made within the State to be performed within the State, and on the part of the plaintiff was performed within the State; and therefore it is exactly within the terms of the statutes. Whether or not the debt is due to a person resident within this State at the time of the first publication of the notice may depend upon the question whether the plaintiff corporation had a domicile within the State.

If our statutes relating to insolvency are constitutional and valid statutes, the courts of this State must enforce them. If they are in violation of the Constitution of the United States, in its application to the case, to that extent they are void. Whatever may be the rule of comity adopted by other courts in enforcing our statutes, the courts of Massachusetts must enforce the statutes of Massachusetts according to their meaning, if they are constitutional and valid statutes.

There is no contention that our statutes relating to insolvency are in violation of the Constitution of Massachusetts. The contention is that, in their application to creditors who are citizens of other States than Massachusetts, they are in violation of the Constitution of the United States. Whether the courts of other

States than Massachusetts, or the courts of the United States, will enforce these statutes in suits brought before them is for such courts to determine. The decisions of the Supreme Court of the United States upon questions of comity, although entitled to the highest respect, are not conclusive upon us. The decisions of that court upon the meaning of the Constitution of the United States are conclusive. The real difficulty is in determining the principle on which the Supreme Court of the United States has decided that a discharge granted under a State insolvency law enacted before the contract sued on was entered into, will not discharge a debt due under the contract, if due to a citizen of another State than that in which the law was passed.

This difficulty has often been noticed. In *Marsh v. Putnam*, 8 Gray, 551, Mr. Justice Thomas, speaking for this court, in carefully reviewing the decisions of the Supreme Court of the United States up to the time of the decision, says: "When, after the most mature consideration, it has been settled by the appropriate tribunal, first, that the power given to Congress to pass bankrupt laws is not exclusive, and that, when Congress does not exercise the power, the States may; and secondly, that the fair and ordinary exercise of that power, by a State law which operates only upon contracts to be made after the law takes effect, does not, within the meaning of the Constitution of the United States, impair the obligation of contracts, I have never been able to see any conflict between our insolvent acts, taken in their full force, and any provision of the Constitution of the United States. So far, however, as the question has been settled by the decisions of the Supreme Court of the United States, our judgment is concluded." He also says: "In this state of the opinions of that tribunal to which, on these subjects, we look for guidance, we know of no safe rule but *stare decisis*, and yet not go beyond the precise limits of the decisions." See *Phoenix National Bank v. Batcheller*, 151 Mass. 589.

The principal decisions of the Supreme Court of the United States on this subject, since those considered in *Marsh v. Putnam*, are *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Gilman v. Lockwood*, 4 Wall. 409; and *Denny v. Bennett*, 128 U. S. 489.

Baldwin v. Hale was a suit brought in the Circuit Court of

the United States for the District of Massachusetts. The plaintiff was a citizen of Vermont, and the defendant a citizen of Massachusetts. The suit was upon a promissory note given by the defendant to the plaintiff, dated in Boston and payable in Boston. The conclusion of the opinion is as follows: "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default." *Baldwin v. Bank of Newbury*, 1 Wall. 234, in this respect simply follows *Baldwin v. Hale*. Since the decision in *Baldwin v. Hale*, this court has followed it when the facts were the same or similar. *Kelley v. Drury*, 9 Allen, 27.

Gilman v. Lockwood was a suit brought in the Circuit Court of the United States for the District of Wisconsin. The conclusion of the opinion is as follows: "State legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case."

In *Denny v. Bennett*, 128 U. S. 489, 497, the opinion in *Gilman v. Lockwood* is quoted, and it is said to be a clear and accurate statement of the doctrine of the preceding cases. The court there say: "Any one who will take the trouble to examine all

these cases will perceive that the objection to the extraterritorial operation of a State insolvent law is, that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court." This last proposition, which is also suggested in the opinions in *Baldwin v. Hale* and *Gilman v. Lockwood*, seems to me somewhat different from any constitutional doctrine relied upon by Mr. Justice Johnson in his final opinion in *Ogden v. Saunders*, 12 Wheat. 213, 358.

In *Stoddard v. Harrington*, 100 Mass. 87, decided in 1868, after the decision of the Supreme Court of the United States in *Gilman v. Lockwood*, this court held that, if a contract is made between two citizens of this State, within the State, and one of them afterwards removes therefrom and becomes a citizen of another State, and the other then obtains in this State, where he continues to reside, a discharge under the insolvent laws which were in force when the contract was made, the discharge is a bar to an action against him on the contract. The court say: "Regret has been frequently expressed by judges of the courts of the United States, as well as by those of the several States, that with all the learning and ability which have been bestowed upon the discussion it has not been found practicable to place the decisions on this important subject upon some clear and intelligible basis of principle. But the reasons given by different judges for coming to the same conclusions have been so diverse, and the grounds assigned for judgments not certainly repugnant to each other have been sometimes so apparently inconsistent, that it is difficult to do more than follow adjudged cases in their liberal application, without attempting to gather from them a rule which affords a sure solution of new questions." The court also say: "The suggestion that the power of a State over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency, does not seem to us well founded, because we think that the effect of the insolvent law

qualifies the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction." This decision has not been overruled by this court, and the precise case does not seem to have come before the Supreme Court of the United States. See *Pullen v. Hillman*, 84 Maine, 129.

The doctrine that the statutes of a State, *ex proprio vigore*, have no extraterritorial force is a doctrine of the common law, and not a provision of the Constitution of the United States. The decision in *Ogden v. Saunders* was made forty years before the adoption of the Fourteenth Amendment of the Constitution of the United States, and was not put upon the principle declared in *Pennoyer v. Neff*, 95 U. S. 714. A discharge under the bankruptcy laws of England is held in the courts of England to be a discharge of debts due to citizens or subjects of other countries, without any regard to the question whether the courts of England have any jurisdiction over the foreign creditors whereby they could render personal judgments against them. See Dicey, *Confl. Laws*, 448 *et seq.*; *Ellis v. M'Henry*, L. R. 6 C. P. 228. It is probable that a discharge under the bankruptcy laws of the United States which purported to discharge the debtor from all debts provable against his estate would be held a bar to an action in the courts of this country by a non-resident alien on a debt due him which could have been proved against the estate. Bump, *Bankruptcy*, (11th ed.) 713.

Without considering whether this court in any event would follow the decision of the Supreme Court of the United States in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, it appears that the plaintiff corporation had appointed the commissioner of corporations to be its true and lawful attorney, upon whom all legal processes in any action or proceeding against it might have been served, pursuant to St. 1884, c. 330, and the amendments thereof, so that a personal judgment at the time of the institution of the proceedings in insolvency could have been rendered against it in the courts of Massachusetts which would be recognized as valid everywhere, and it also could have become or been made an insolvent debtor under our statutes relating to insolvency. St. 1890, c. 821.

It is true that a corporation established by the laws of a State of the United States is, for the purpose of the jurisdiction of the courts of the United States, regarded as a citizen of the State by whose laws it was created, although it is not a citizen within the meaning of the clause in the Constitution of the United States which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. I am unable to see that the question discussed depends upon the citizenship of the parties, in any proper sense of the word citizenship. It may be that it depends upon inhabitancy or domicil. I am unable to believe that the Supreme Court of the United States would hold that the insolvent laws of Massachusetts did not apply to contracts made after the passage of the laws in Massachusetts between a citizen of Massachusetts and a subject of Great Britain domiciled in Massachusetts at the time. See *Olivieri v. Atkinson*, 168 Mass. 28. The Fourteenth Amendment of the Constitution of the United States now defines who are citizens of the United States and of the States. Whether a corporation can have a domicil other than that in the State under whose laws it was incorporated is undoubtedly a question of some difficulty, but I think the better opinion is that it can. *Attorney General v. Bay State Mining Co.* 99 Mass. 148, 153. *Ricker v. American Loan & Trust Co.* 140 Mass. 346, 350. *Garham v. Mutual Aid Society*, 161 Mass. 357, 366. Many corporations are organized by citizens or inhabitants of Massachusetts under the laws of other States, for the sole purpose of doing business in Massachusetts, and they have a place or places of business only in Massachusetts; and to hold that contracts made by them in Massachusetts with the inhabitants of Massachusetts, since the passage of our insolvent laws, are not subject to be discharged under those laws, seems to me unwarrantable, particularly when the corporations bring their suits in the courts of Massachusetts. If the operation of the insolvent laws of Massachusetts upon contracts made here between persons domiciled here can be avoided upon the ground that they were made in behalf of corporations organized under the laws of other States, although having usual places of business here and subject to be sued here, then it will be possible for foreign corporations to

obtain substantially all the business advantages in Massachusetts conferred by our laws without subjecting themselves to the liability of having debts due to them and contracted within the Commonwealth discharged by proceedings in insolvency on the part of inhabitants of the Commonwealth with whom the contracts were made. I know of no decision of the Supreme Court of the United States upon exactly the state of facts appearing in the present case, and on principle I do not see why the contract made and performed here by the parties in this case is not subject to be discharged in accordance with the laws of Massachusetts in force when the contract was made. The contract undoubtedly is to be governed generally by the laws of Massachusetts, and the plaintiff has elected to bring its suit in a Massachusetts court, and the plaintiff is not only subject to be sued in Massachusetts, but may be made an insolvent debtor under the insolvency statutes of Massachusetts. St. 1890, c. 321. To enforce our insolvency statutes in the case of such a contract entered into here between such parties, after the insolvency statutes were passed, does not seem to me to give the statutes any extraterritorial force, and the plaintiff corporation seems to me, in reference to contracts made here with citizens or inhabitants of Massachusetts, to be subject to our laws. I am not aware that any one has pointed out the particular provisions of the Constitution of the United States which our insolvency statutes would violate if it were held by the courts of Massachusetts that the discharge pleaded in the present action was a bar to the action. The early decisions of the Supreme Court of the United States were only to the effect that contracts entered into before the passage of the insolvency statutes of a State, or entered into in another State than that in which such statutes had been passed but to which the contracts were not subject, could not be discharged under the statutes, because under the Constitution of the United States no State could pass a "law impairing the obligations of contracts." But this seems inapplicable to contracts entered into within a State, subject to the laws thereof, when insolvency statutes are in existence within the State, and are a part of the laws to which the contracts are subject.

It is evident that in recent years this court, in its anxiety to

do nothing which might seem to be in violation of the Constitution of the United States according to the later decisions of the Supreme Court of the United States, has rendered decisions which go far in the direction of the decision of the court in the present case. *Guernsey v. Wood*, 130 Mass. 503. *Phoenix National Bank v. Batcheller*, 151 Mass. 589. *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. In *Guernsey v. Wood* the plaintiff was not a corporation, but a citizen of Pennsylvania, never resident in Massachusetts. In *Phoenix National Bank v. Batcheller* it does not appear that the plaintiff corporation had any usual place of business in Massachusetts, or had complied with our statutes regulating foreign corporations doing business here, or was subject to legal process here. The same is true of *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11. In none of these cases was there anything in the nature of the license shown in the present case. These distinctions seem to me important. Whether such a license could lawfully be granted to a foreign corporation is a question which has not been argued, but, if the license was void, the liquors were sold in violation of law, and the plaintiff cannot maintain its action. Certainly it is going beyond the "precise limits" of the decisions of the Supreme Court of the United States, if it is held that the discharge pleaded in the present suit is invalid.

I think that this court ought to uphold the validity of the discharge, in the present case, until the Supreme Court of the United States has decided to the contrary.

The question, of course, becomes of little importance when there are bankruptcy laws of the United States in force; but such laws have been in force only for short periods of time, and the insolvency laws of Massachusetts are not repealed, but only suspended, by the bankruptcy laws of the United States.

ALENA H. DAVIS vs. JOHN O. CARPENTER.

Berkshire. September 13, 1898. — October 29, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Bastardy — Plea — Residence of Complainant — Evidence — Trial.

A plea to a complaint under the bastardy act, Pub. Sts. c. 85, setting out enough to show that no cause of action exists under the statute, is a plea in bar, and not in abatement.

If a girl eighteen years old, living with her parents in another State, is told by her father that he can no longer support her and that she must find a home elsewhere, and, with his assent and assistance, goes from her home by previous arrangement, with all her personal effects, to the house in this Commonwealth of a person who is willing to receive her into his family as his daughter, with the intention of making it her home and of not returning to her former home, she may maintain a bastardy complaint made on the day of her arrival here, although the child was begotten in the other State, where the respondent resided, and was also born there while she was visiting her father during his illness, having returned there for such visit nine days after her arrival here, and, by reason of her confinement, remaining there about seven weeks, and then returning and residing here continuously until the trial of the complaint.

At the trial of a complaint for bastardy by a girl eighteen years old, who left her home in another State, where the child was begotten and the respondent resided, having been told by her father that he could no longer support her and that she must earn her own living, and went to the house in this Commonwealth of B., who was willing to give her a home, and made the complaint here, the judge admitted evidence of the complainant that she had previously "made her own trades" for work she had done and "herself received the pay therefor"; that she told the respondent of her condition, and he left the town soon afterwards; and the conversation between her and her father as to his inability to support her and the necessity of her making her home elsewhere and taking care of herself; also the conversation upon her arrival at B.'s house as to his willingness to receive her as his daughter, and as to her father resigning control of her; and her testimony that since her arrival her home had been at the house of B., who had supported her since then, and her father had done nothing for her support. *Held*, that no error appeared.

The respondent in a bastardy complaint is not entitled to try anew, before a jury, upon the plea of not guilty, the questions which have been raised by pleas in abatement and in bar, and tried before the judge without a jury, and evidence offered for that purpose is rightly excluded.

COMPLAINT, dated July 27, 1897, under the bastardy act, Pub. Sts. c. 85, describing the complainant as of Clarksburg in this Commonwealth. The respondent filed a plea in abatement, alleging that the complainant's residence was in Readsboro in

the State of Vermont, and not in Clarksburg in this Commonwealth. The complainant also filed a supplemental complaint, setting forth the birth of the child since the original complaint, and joined issue upon the plea.

The respondent then, by leave of court, filed a second plea, averring that, at the time when the child was alleged to have been begotten by him, both he and the complainant were domiciled in the State of Vermont; that, at the time of making the complaint, the complainant was not, and never had been, a resident of this Commonwealth, but was a resident of the State of Vermont; that no child had ever been born to the complainant in this Commonwealth; and that the court had no jurisdiction of the complaint. The complainant joined issue upon this plea, and the pleas were heard together in the Superior Court, without a jury, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

The respondent called the complainant as a witness, and she testified that she was born in Readsboro, Vermont; that she was eighteen years old on August 11, 1897; that her father and mother were living together in Readsboro at the time of the trial, and had so lived there for some years; that she lived at her father's house from January, 1897, until July 27, 1897, when she came to Clarksburg in this Commonwealth, to the house of Eugene Brown; that she reached his house in the morning of that day, and in the afternoon of the same day made the complaint in this case at his house to the clerk of the District Court of Northern Berkshire; that she had previously arranged with her counsel to meet the clerk there on that day; that before that time she had never lived in Massachusetts; that prior thereto, either early in July, or late in the preceding June, she had also, by arrangement with her counsel, met the clerk of the District Court of Franklin at Monroe Bridge in Franklin County, and there made to him a complaint charging the same facts as in the complaint at bar; that between the time of making such complaint in Franklin County and her coming to Clarksburg she saw her counsel, and was advised by him that, in order to have this prosecution lie in this Commonwealth, she would have to become a resident thereof, and her principal reason for coming here was to institute this complaint; and that she received a

letter from the wife of Brown, three or four days before she came, concerning her coming, but had not seen her upon the subject. This letter was later put in evidence, subject to the respondent's exception. It was dated July 24, and the witness testified that she received it on July 26, and answered it the same day.

On cross-examination, she testified that since she became large enough she had worked out at housework, and, subject to the respondent's exception, that she had made her own trades for such work, and herself received the pay therefor. She further testified that she discovered in May, 1897, that she was pregnant, and, subject to the respondent's exception, that she went to him about it, and on the following Tuesday he left Readsboro; also, subject to the respondent's exception, that at some time between July 12 and 27, her father said to her that his health was very poor, and he could not support her, and she would have to find a home somewhere else; and that she should have the rest of her wages and take care of herself. She testified further that she had known Mr. and Mrs. Brown since she was a small girl, and at one time lived near to them; that when she went to Brown's, she took her trunk and clothing, and left no personal property or effects of any consequence at her father's; and, subject to the respondent's exception, that on her arrival at Brown's, to whose house her father took her, Mr. and Mrs. Brown said that she could have a home there with them and be one of the family just the same as their own daughter, and that her father said that he had no control of her after that. She also testified that when she went to Brown's her intention was to make her home there; and, subject to the respondent's exception, that since she arrived at Brown's on the morning of July 27, her home had been in Clarksburg, at Brown's, and that she had since been supported by the Browns, and her father had done nothing for her support.

On redirect examination, she testified that she staid continuously at Brown's from July 27 until August 5, 1897, on which day she went to North Adams to the hearing in the District Court in this case; that upon that day she returned to Clarksburg, and went from there on the same day to her father's home in Readsboro, where she remained until September 25, 1897; that

she took with her at that time such clothing as she wished to wear while she was visiting; and that since September 25 she had been in Clarksburg.

On recross-examination, she testified as follows:

“Q. How came you to go back to your father’s on the 5th of August? A. My father was very sick, and so my sister came after me and wanted me to go and make him a visit, and so I went. — Q. How did you find your father after you got there? A. Quite sick. — Q. Confined to the bed? A. He had his clothes on, and had been confined to his bed. — Q. What was the matter with him? A. He had sugar diabetes and rheumatism. — Q. And why did you remain so long as you did? A. Because he was sick. — Q. And what was the result to yourself? A. I was taken sick. — Q. Were you taken sick before you expected to be? A. Yes, sir. — Do you know the reason why you were taken sick before you expected to be? A. Why, I think the excitement. — Q. Of your father’s sickness? A. Yes, sir. — Q. And your child was born there? A. Yes, sir. — Q. How long after that was it before you were able to go back? A. Six weeks. — Q. And then what did you do? A. I came back to Clarksburg.”

On redirect examination, she testified that her friends did not think it best for her to go back to Clarksburg before September 25; that she paid her father \$25 for board between August 14 and September 25, and paid her doctor’s bills; that she did no housework at her father’s house between those dates; that the respondent lived in Readsboro in December, 1896, and down to May, 1897, and had always lived there so far as she knew; and that his father and mother had lived there as long as she had known them.

Richard I. Davis, the father of the complainant, testified that he had lived in Readsboro for nine years; that the complainant had worked out for various families in Readsboro since she was twelve years old, except when she was at school; and, subject to the respondent’s exception, that a week or ten days before she came to Clarksburg he told her that he was sick and could not support her, and she must take her own time and earn her own living, and that he could not support her in the condition he was in, and in the condition she was in; that he took her to Brown’s, and Mrs. Brown said she might come and make her home there;

that he said he was perfectly willing she should go there and make it her home; that he could not support her, and that they might have her earnings and look after her the same as their own family; and that he had exercised no control over her since she came to Massachusetts.

On cross-examination, he testified that on the Saturday before he took his daughter to Brown's he and his wife had a talk with Mr. and Mrs. Brown at the latter's house; that Mr. and Mrs. Brown stated to him and his wife that the complainant might have a home there; that the Browns were to give an invitation to the complainant to come there; that he saw the letter which his daughter received from Mrs. Brown; and that it was Tuesday, July 27, when he took his daughter to the Browns.

The respondent requested the judge to rule, upon all the evidence, that the pleas were sustained, but the judge refused so to rule, and overruled both pleas; and the respondent excepted.

The case was then tried before a jury, upon the defendant's plea of "Not guilty." Counsel for the respondent offered to admit, for the purposes of the case, that the respondent was the father of the complainant's child. Counsel for the complainant accepted this admission, but, at the suggestion of the judge, called the complainant as a witness, who testified to facts sufficient to warrant the finding that she was the mother of a living child, born August 14, 1897, in Readsboro, Vermont, begotten there in November or December, 1896, by the respondent; and that she and the child were living at the time of the trial, November 5, 1897, at the Browns in Clarksburg, in this Commonwealth.

Counsel for the respondent stated that he did not desire to cross-examine the witness upon the question of the parentage of her child, but he proposed to cross-examine her upon the question of her residence, and facts relative thereto, and to the jurisdiction of this court. The judge refused to permit him so to do.

The respondent then offered to show that he was twenty-three years old on February 14, 1897; that he was born in Vermont, and resided there until some time in May, 1897; that his father and mother still resided there; that the complainant was born in Vermont on August 11, 1879, and resided there until July 27, 1897; that her father and mother were both residents of Vermont, living together and keeping house; that from some time

in January, 1897, until July 27, 1897, the complainant's home had been with her father and mother; that on July 12, 1897, she came to Monroe Bridge, and made a complaint in the District Court of Franklin against this respondent for bastardy; that the complaint was dismissed in that court for lack of jurisdiction; that between that date and July 27, she saw her counsel at her father's home in Vermont, and was advised by him that she could not maintain her prosecution in this Commonwealth, unless she acquired a residence here; that on July 24 her father and mother came to Massachusetts, to the house of one Brown, in Clarksburg, and there talked with Brown and his wife in regard to the condition of their daughter and her future home, and the prosecution against the respondent; that it was arranged between them that the Browns should send a written invitation to the complainant to come and make her home with them; that the letter was received by her on July 26; that she replied that she would come, and on July 27 she came, arriving at the house of Brown in the forenoon, and on the afternoon of the same day, by previous arrangement made between her and her attorney, she met him and the clerk of the District Court of Northern Berkshire at the Browns' house in Clarksburg, and there instituted these proceedings; that her principal reason for coming into Massachusetts was to qualify herself to maintain this complaint, as she had been advised; and that on August 5 she returned to the home of her father, in Readsboro, where her child was born on August 14, and where she remained until September 25, 1897.

The judge ruled that all the evidence included in this offer was incompetent and immaterial, and excluded the same; and the respondent excepted.

The jury returned a verdict of guilty; and the respondent alleged exceptions.

F. L. Greene, for the respondent.

C. P. Niles, for the complainant.

HAMMOND, J. The second plea was not in abatement, but in bar. It set out enough to show, not only that the present action could not be maintained, but that there was no cause of action under the statute. *Allin v. Connecticut River Lumber Co.* 150 Mass. 560. 1 Chitty, Pleading, (16th Am. ed.) 462. *Grant v. Barry*, 9 Allen, 459.

The issues raised by the first plea and this second plea were tried together without a jury, and the court, after hearing the evidence, "overruled both pleas." We do not understand by this entry that the ruling was that the facts set forth in the second plea would not, if proved, constitute a complete defence, but that the court found that the allegations of the plea were not all proved. The respondent excepted to this, as also to certain rulings made during the trial concerning the admission of evidence.

The only question really in dispute at this trial was whether at the time of making the complaint the complainant was, and thereafter continued to be, such a resident in this Commonwealth as to be able to maintain this action; and inasmuch as the child was begotten in Vermont, (the mother being then a resident and domiciled there,) and was born in Vermont, this was a vital issue. *Grant v. Barry, ubi supra.*

On this issue did the evidence warrant a finding for the complainant? We think it did. It is to be remembered that the object of the statute is to compel the father to assist the mother in the maintenance of the child, and to secure the municipality or State against any loss or expense for its maintenance. *McFadden v. Frye*, 13 Allen, 472.

The court might have found upon the evidence that before the day on which the complaint was made the father of the complainant told her that he could no longer support her; that she must earn her own living and might have her own wages, and that she must leave his house; that, thus being driven from the paternal roof, with the assent and assistance of her father she made an arrangement with the Browns to go and live with them in Clarksburg as their daughter; that in the forenoon of the day on which the complaint was made, in pursuance of this arrangement and with the full assent of her father, she left her home in Vermont and came with all her personal effects to the house of the Browns in Clarksburg for the purpose of making her home with them in their family as their daughter, for an indefinite period and with no intent of returning to Vermont; and that at the time she made the complaint she was thus living with the Browns. The court might further have found that her subsequent visit to her father in Vermont was not for the purpose of resuming her relations with her prior home, but was

simply for a temporary purpose, and that her home still continued with the Browns up to the time of the trial; that both father and daughter had determined that she should become a resident at Clarksburg with the Browns; and that all this was honestly done for the purpose of having a *bona fide* residence in Clarksburg.

Whether, she being a minor and her father still domiciled in Vermont, all this worked a change of her legal domicile it is not necessary to decide. She was residing here, and she was intending to continue to reside here. In fact she had no other place which she called or considered her home. If she had fallen into distress under these circumstances, it would have been the duty of the town or State to provide temporarily at least for her relief, and a like duty would have existed with reference to the child, if born alive. Pub. Sts. c. 84, §§ 14, 17.

Here, then, was a liability to be provided against by obtaining security from the putative father, and the case comes within the statute, so far as the residence of the complainant is material.

We see no error in the various rulings of the court as to the admission of evidence at the trial without a jury.

As to the admission of the letter of July 24 from Mrs. Brown, it is sufficient to say that its contents are not before us. The evidence that she had previously "made her own trades" for work she had done and "herself received the pay therefor," as well as that concerning the conversations with her father between the 12th and 27th days of July, and also that concerning the conversation which took place upon her arrival at Mr. Brown's house, both as testified to by the complainant and her father, all had a bearing, at least, upon the relation she sustained to her father and the relation she sustained to the Browns, and as a part of the circumstances; and the same may be said of the evidence at the close of the cross-examination of the complainant. The conversation with the respondent and the fact that he left Readsboro were admissible, at least as bearing upon the question of her real purpose in coming to Clarksburg.

Upon the trial before the jury, upon the plea of not guilty, the respondent proposed to try anew the questions which had been raised and tried by the court without a jury. The court refused to permit him to do so, and excluded the evidence offered for that purpose. There was no error in this.

This is a civil suit, and the respondent, by proceeding to trial without a jury upon these issues, must be held to have waived whatever right he might otherwise have had to a jury trial upon them.

Exceptions overruled.

COMMONWEALTH vs. WILLIAM C. CLEARY.

SAME vs. PATRICK J. GUIHEEN.

Hampshire. September 20, 1898. — October 29, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Rape — Evidence — Complaint by Child to Mother next Morning after Act.

It cannot be said, as matter of law, that, at the trial of an indictment for rape of a girl fourteen years old, the judge was not justified in admitting evidence that the girl "made complaint to her [mother] the next morning after the occurrence as to what had been done to her by the defendants the night before," if it appears that the alleged rape was between nine and ten o'clock in the evening; that the girl was not out of the defendants' company until half past ten, when she entered a friend's house crying, excited, and frightened; that the friend took her to her home at twelve o'clock, when she was still frightened and trembling, and her mother put her to bed; and that she made the complaint the next morning.

TWO INDICTMENTS, each alleging that the defendant, on August 21, 1897, at Northampton, unlawfully and carnally knew and abused a female child of the age of fourteen years. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict of guilty in each case; and the defendants alleged exceptions, which appear in the opinion.

J. T. Keating, (*J. B. O'Donnell* with him,) for the defendants.

J. C. Hammond, District Attorney, for the Commonwealth.

HOLMES, J. These are indictments for unlawfully abusing a female child under the age of sixteen years. St. 1893, c. 466, § 2. They come here on exceptions to evidence that the child "made complaint to her [mother] the next morning after the occurrence as to what had been done to her by the defendants the night before." It does not appear that more was admitted than the fact that the child made complaint, with sufficient to identify the subject matter, and therefore it is not necessary to

consider whether the whole statement would have been admissible if offered, as the District Attorney asks us to decide. The only question argued for the defendants is whether the statement appears, as matter of law, to have been too remote in point of time to be admissible. It is not argued that the common law in cases of rape does not apply. See *Commonwealth v. Roosnell*, 143 Mass. 32; *Commonwealth v. Hackett*, 170 Mass. 194, 196.

The rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal. Glanville, XIV. 6. Bract. fol. 147 a. Fleta, I. c. 25, § 14. St. 4 Edw. I. St. 2. Appeals became obsolete and left rape to be dealt with by indictment before the development of the modern law of evidence. Lord Hale, after stating the old law as to appeals, quoting Bracton, went on to deal with the evidence upon an indictment for rape. Having stated that the party ravished might give evidence upon oath, the value of which would be affected by corroborative facts, he recurred to the matter of fresh complaint, and said that if she "presently discovered the offence, made pursuit after the offender," etc., "these and the like are concurring evidences to give greater probability to her testimony." 1 Hale P. C. 632, 633. Obviously this was suggested by and merely echoed the requirement in appeals, but it gave that requirement a more or less new turn. If it means what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. In general, you cannot corroborate the testimony of a witness by proof that he has said the same thing before, when not under oath. But Lord Hale's statement of the law has survived as an arbitrary rule in the particular case, notwithstanding the later developed principles of evidence, and, although nowadays recognized as an exception attempted to be fortified by exceptional reasons, still is put upon the ground upon which it was placed by his words. The evidence is not admitted as part of the *res gestæ*, or as evidence of the truth of the things alleged, or solely for the purpose of disproving con-

sent, but for the more general purpose of confirming the testimony of the ravished woman. *The Queen v. Lillyman*, [1896] 2 Q. B. 167, 170, 177. 3 Russ. Crimes, (6th ed.) 387. (See Greaves's note *m*.) *State v. Kinney*, 44 Conn. 153, 155. *Haynes v. Commonwealth*, 28 Gratt. 942, 947, 948. *Hornbeck v. State*, 35 Ohio St. 277, 280. *People v. O'Sullivan*, 104 N. Y. 481, 486. 14 Am. Law Rev. 830, 838. Greenl. Ev. § 213. 1 McClain, Crim. Law, §§ 455, 456.

It follows that the complaint could not be rejected because it was no part of the *res gestæ*, or because under our statute the child was too young to consent. The former point was argued by both sides, seemingly under the mistaken notion that the complaint is substantive evidence of the facts charged. The test is whether, according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial. It does not appear whether the child testified or not, but it would seem that she did, and, on the bill of exceptions, it must be assumed that she did. The only question open, therefore, is whether it can be said, as matter of law, that the complaint was made too late. This depends upon a preliminary finding by the judge. *Commonwealth v. Bond*, 170 Mass. 41, 43. We cannot say that the admission of the evidence was not justified. The alleged rape was between nine and ten o'clock in the evening. The girl was not out of the alleged ravishers' company until half past ten, when she entered a friend's house, crying, excited, and frightened. The friend took her to her home at twelve. She was still frightened and trembling, and her mother put her to bed. She made the complaint the next morning. It might have been found on this evidence that she was not in a condition to speak until she had rested, and that she was dealt with accordingly. *Hill v. State*, 5 Lea, 725, 732. *State v. Knapp*, 45 N. H. 148, 155.

Some cases have cut free from the original ground, and intimate that lapse of time before making complaint goes only to its weight, not to its competency. *State v. Mulkern*, 85 Maine, 106. *State v. Niles*, 47 Vt. 82, 86. But it is not necessary to lay down so broad a rule. In extreme cases the evidence has been ruled out. *People v. O'Sullivan*, 104 N. Y. 481, 490.

Exceptions overruled.

PARMENTER MANUFACTURING COMPANY vs. H. WARREN
HAMILTON & others.

Worcester. October 7, 1898. — November 1, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Statute — Bankrupt Law a Bar to Proceedings in Insolvency.

The act of Congress of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," so far supersedes the insolvency laws of this Commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after said date.

BILL IN EQUITY, praying that a decree of the judge of insolvency of September 6, 1898, on a petition of the defendants that a warrant issue to a messenger to take possession of the plaintiff's estate be reversed, that the warrant be recalled and the petition dismissed, and that the messenger be enjoined from interfering with the property of the plaintiff. The contention of the plaintiff was that at the time when the petition was filed, on August 1, 1898, the insolvency laws of the Commonwealth had been wholly suspended by the act of Congress of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States."

The defendants demurred, assigning as grounds therefor want of equity; and the question of law was reserved, by *Lathrop, J.*, for the consideration of the full court.

C. M. Rice, for the defendants.

E. I. Morgan, (*R. A. Stewart* with him,) for the plaintiff.

KNOWLTON, J. The United States bankruptcy law passed on July 1, 1898, ends with the following provision: "This act shall go into full force and effect upon its passage; provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it."

The question in this case is whether this act so far superseded the insolvency laws of this Commonwealth from the time of its

passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. This depends upon the intention of Congress, as manifested by the language above quoted. Of the power of Congress to pass an act having this effect, there is no doubt. Const. U. S. Art. 1, § 8, cl. 4. *Griswold v. Pratt*, 9 Met. 16. *In re Klein*, 1 How. 277, 280, 281. *Sturges v. Crowninshield*, 4 Wheat. 122, 192. *Ogden v. Saunders*, 12 Wheat. 213, 369. The language is materially different from that of the bankruptcy act of 1867, and from that of the earlier bankruptcy law of 1841. See U. S. St. March 2, 1867; *Day v. Bardwell*, 97 Mass. 246; *Judd v. Ives*, 4 Met. 401; *Swan v. Littlefield*, 4 Cush. 574. The argument that the change in question was intentional is almost irresistible. The act is to "go into full force and effect upon its passage." That is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (§ 3), to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions determined by it (§ 4), and to have preferences and liens governed by the provisions of it (§§ 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the States, and perhaps different from those found in the laws of any State, and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of State courts provides for cases commenced in those courts before the passage of the act. The plain implication is that proceedings commenced in the State courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect

from the time of its passage, except that the filing of petitions is to be postponed for a short time.

We are of opinion that the language was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the statute.

Demurrer overruled.

JAMES SHELTON *vs.* BOSTON AND ALBANY RAILROAD
COMPANY.

WILLIAM SHELTON *vs.* SAME.

Middlesex. March 17, 1898. — November 21, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, BARKER,
& HAMMOND, JJ.

Grade Crossing — Damages for Draining Well — Statute — Location of New Railroad.

Where a railroad excavates the land along the line of its new location to the depth of about fifteen feet below the level of its former roadbed, and thereby permanently drains the well of A. on his land, a short distance away from the land taken and separated from it by the land of other persons, A. suffers damage from the taking of land for use as a railroad within the meaning of St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings"; and under St. 1891, c. 123, the damage is of a kind which would entitle him to compensation if occasioned by the taking of land for locating and laying out a railroad.

Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish.

TWO PETITIONS for damages caused by the abolition of a grade crossing in the town of Natick. Trial in the Superior Court, before *Sheldon, J.*, who ruled that the petitioners could not recover, and directed the jury to return a verdict for the respondent in each case; and the petitioners alleged exceptions. The facts appear in the opinion.

The cases were argued at the bar in March, 1898, and afterwards were submitted on briefs to all the justices except *Holmes, J.*

F. M. Forbush, for the petitioners.

P. H. Cooney, for the respondent.

KNOWLTON, J. The respondent took land under St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," and St. 1891, c. 123, in amendment thereof, for the purpose of changing its grade at a crossing in accordance with the report of commissioners appointed under the provisions of the statutes. It excavated the land along the line of the new location to the depth of about fifteen feet below the level of its former roadbed, and thereby permanently drained the wells of the petitioners on their lands a short distance away from the land taken, and separated from it by the land of other persons. These petitions are brought by the petitioners respectively to recover damages for the loss of their respective wells, and no other damage is claimed. Damages in such cases are to be assessed "in the same manner, and under like rules of law, as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town." St. 1890, c. 428, § 5. St. 1891, c. 123, § 1.

If any part of the land of the petitioners had been taken, there is no doubt, upon all the authorities, that in assessing their damages an allowance would have been made for the draining of their wells upon the land that remained. *First Church in Boston v. Boston*, 14 Gray, 214. *Geraghty v. Boston*, 120 Mass. 416. *Murphy v. Boston*, 120 Mass. 419. *Brady v. Fall River*, 121 Mass. 262, 264. *Lane v. Boston*, 125 Mass. 519. *Sisson v. New Bedford*, 137 Mass. 255.

There are many cases in which the statute giving damages occasioned by the taking of land for railroads has been discussed, and in which it has been said that the right of one who has suffered special and peculiar damages to his property occasioned by the taking of land for a railroad to recover damages for his injury does not depend upon the question whether any part of his land is taken. *Dodge v. County Commissioners*, 3 Met. 380. *Ashby v. Eastern Railroad*, 5 Met. 368. *Babcock v. Western Railroad*, 9 Met. 553, 555. *Parker v. Boston & Maine Railroad*, 3 Cush. 107. *Proprietors of Locks & Canals v. Nashua & Lowell Railroad*, 10 Cush. 385. *Curtis v. Eastern Rail-*

road, 14 Allen, 55. *Parker v. Boston & Maine Railroad* was almost identical with the case at bar, except that the land was taken for the construction of a new railroad instead of for the alteration of an old one. It was held that the petitioner, no part of whose land was taken, might recover damages for the draining of his well. In *Trowbridge v. Brookline*, 144 Mass. 139, it was held, after full consideration and a citation of the authorities, that one might recover damages to his land caused by the construction of a sewer, although no part of the land was taken or entered upon. In *Dana v. Boston*, 170 Mass. 593, the latest case considered by this court, the petitioners, no part of whose land abutted upon the highway, were allowed to recover damages to their property from the changing of the grade in making specific repairs upon a highway. The language of the statutes under which these decisions were made, as construed by the court, seems to show a purpose on the part of the Legislature, when land is taken for the construction of a railroad, a highway, or a sewer, not only to make compensation to owners for the land taken, but also, when one suffers special and peculiar damages to his property by the taking of land for such a use, to compensate him for the injury. These cases show that the principle applies without reference to the question whether any part of the petitioner's land is taken, so as also to give him the right to payment for property which passes to the public.

These principles and authorities control the present case, unless a distinction is to be made between cases which arise under these statutes in regard to railroad crossings, and those that arise under the Public Statutes authorizing the taking of land for the construction of new railroads and highways. Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. There can be no doubt that these enactments in regard to changes at railroad crossings look to damages caused by the use to which the land is to be put, as well as the analogous sections of the Public Statutes to which they refer. In terms, they give compensation for damages occasioned by the taking of lands for these public uses. The provisions of the Public Statutes go no further.

The questions involved in the present case were considered in *Rand v. Boston*, 164 Mass. 354, and the decision was made to turn upon the distinction between the language of the statute and the provisions of the Public Statutes in regard to taking lands for sewers and for railroads. Whether there is or is not a sound distinction between this case and the present cases, a majority of the court are of opinion that the present cases should be decided as if the land had been taken under the provisions of the Public Statutes for locating new railroads.

Exceptions sustained.

LAVINIA N. DICKINSON vs. MABEL L. TODD & another.

Hampshire. September 20, 1898. — November 21, 1898.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, BARKER,
& HAMMOND, JJ.

Fraud — Equity Practice — Appeal from Decree.

Upon appeal from a decree of a justice of the Superior Court sitting in equity on questions of fact arising upon oral testimony heard before him, his decision will not be reversed unless it is plainly wrong.

BILL IN EQUITY, filed November 16, 1896, in the Superior Court, against Mabel L. Todd and David P. Todd, her husband, to set aside a conveyance of land in Amherst to the said Mabel, alleged to have been procured by misrepresentation and fraud. Hearing before *Hopkins*, J., who entered a decree for the plaintiff; and the defendants appealed to this court. The facts appear in the opinion.

The case was argued at the bar in September, 1898, and afterwards was submitted on briefs to all the justices except *Field*, C. J.

E. C. Bumpus & W. J. Reilley, (*W. Hamlin* with them,) for the defendants.

J. C. Hammond, (*H. P. Field & S. S. Taft* with him,) for the plaintiff.

KNOWLTON, J. The justice of the Superior Court found that the deed in question was procured by fraud of the grantee, and

entered a decree for the plaintiff. The defendants appealed, and the question before us is whether the finding of the judge was erroneous. An appeal in equity brings to the appellate court questions of fact which arise upon the record, as well as questions of law. But the practice which has long prevailed in Massachusetts of presenting the testimony in suits in equity orally instead of in writing has materially changed the effect of appeals in such suits upon questions of fact. Under the old practice of presenting all the testimony by deposition, the appellate tribunal had before it the evidence in the same form as when it was considered by the lower court. But under the present system the judge who sees and hears the witnesses has a great advantage in the search for truth over those who can only read their written or printed words. For this reason the rule has long been established that upon an appeal from a decree of a judge in equity upon questions of fact arising on oral testimony heard before him, his decision will not be reversed unless it is plainly wrong. *Reed v. Reed*, 114 Mass. 372. *Chase v. Hubbard*, 153 Mass. 91. *Debinson v. Emmons*, 158 Mass. 592. *Biggerstaff v. Marston*, 161 Mass. 101. *Wentworth v. Woods Machine Co.* 163 Mass. 28. *Gutlon v. Marcus*, 165 Mass. 335. *McKay v. Kean*, 167 Mass. 524. *S. K. Edwards Hall Co. v. Dresser*, 168 Mass. 136.

In the present case there was testimony at the trial on which the court could properly find for the plaintiff.

It would serve no useful purpose to review the evidence. The judge of the Superior Court saw the witnesses, observed their manner of testifying, formed his opinions about them, not merely in regard to their credibility in the ordinary sense, but in the case of the plaintiff and the female defendant in regard to everything in their temperament, experience, and habits of life which would help him in discovering the truth. Seldom is there a case in which the reasons for the rule that weight should be given to the impressions produced by seeing and hearing the witnesses are so strong as in this case. From reading the printed testimony a majority of the court is unable to say that the judge who presided at the trial, and had opportunities for ascertaining facts which we cannot have, was wrong in his conclusions.

Decree affirmed.

ALEXANDER MACK vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Hampden. September 29, 1898. — November 21, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, LATHROP, BARKER,
& HAMMOND, JJ.

*Personal Injuries — Statute — Corporation — Clerk — Secretary —
Written Notice.*

The secretary of a Connecticut railroad corporation, which has no officer called a clerk, is a clerk within the meaning of § 2673 of the General Statutes of Connecticut, which requires notice of an action against a corporation to be given to its clerk.

TORT, for personal injuries. Trial in the Superior Court, before *Blodgett, J.*, who ruled that the action could not be maintained because notice was not given as required by law, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in September, 1898, and afterwards was submitted on briefs to all the justices.

D. E. Leary, for the plaintiff.

W. S. Robinson, for the defendant.

HOLMES, J. This is an action for personal injuries sustained by the plaintiff while crossing the defendant's road upon a highway in the State of Connecticut. The plaintiff's case is that he fell and was hurt because the planks of the crossing were rotten; that the statutes of Connecticut made it the defendant's duty to keep the planks in repair, and that they give him an action for injuries caused by the defendant's failure to obey the law. Conn. Gen. Sts. §§ 2673, 3499. But by § 2673 the right to maintain the action against a corporation is made conditional upon giving written notice within a certain time to the clerk of such corporation. The judge before whom the case was tried ruled that the action could not be maintained because notice had not been given as required by law. The plaintiff excepted.

No written notice was given by the plaintiff except a letter from his lawyer addressed and sent to the president of the de-

feudant company. The lawyer testified that, before sending the letter, he examined the reports of the defendant and also of the railroad commissioners, and made inquiries, and found no officer of the company called the clerk. But it did appear that there was a secretary, William D. Bishop, Jr., at Bridgeport in the State. The only question raised by the ruling which it is necessary to consider is whether this secretary was the clerk of the corporation within the meaning of § 2673. A majority of the court is of opinion that the two words have the same meaning so far as this case is concerned. By § 3455 it is provided that the direction of the affairs of such companies shall be in a board of directors who shall elect a president "and may also choose a secretary who shall also be secretary of the company, and be sworn to a faithful discharge of his duty." There is no other provision for a clerk. Yet there is no doubt that § 2673 applies to railroad companies. *Shalley v. Danbury & Bethel Horse Railway*, 64 Conn. 381, 386, 387. *Mack v. Boston & Albany Railroad*, 164 Mass. 393. It is not to be supposed that the Legislature would have required the notice to be given to the clerk of such companies if it did not assume that they must have a clerk, taking that word in the sense in which it was used in § 2673 making the requirement. We are aware of no difference between the duties of the secretary of a corporation, at least where there is no officer distinctively called clerk, and those of one called clerk. No difference is suggested by the counsel for the plaintiff or by the dictionaries. "Clerk" and "secretary" seem to be regarded as synonymous in a recent learned work. 4 Thompson, Corp. § 4693. It is said that the statute should be liberally construed. We do not get much light from such generalities, but surely it would be a very illiberal construction under the circumstances which we have stated to say that a notice to the secretary did not satisfy the words of the act. Yet if the words of the act can be satisfied they must be. Leaving on one side the case where they cannot be complied with, compliance with them is a condition precedent to the right of action given by the law. *Gardner v. New London*, 63 Conn. 267, 269. *Fields v. Hartford & Wethersfield Horse Railroad*, 54 Conn. 9. *Veginan v. Morse*, 160 Mass. 143, 146. It is not enough that the corporation has had actual notice, however full

and complete, if the form prescribed by the statute could have been followed but was not. If, for instance, the defendant had had an officer called a clerk, we suppose that no one would contend that the notice in this case was good under the act. If that be so, and there is a synonymously named officer who is a clerk in functions and attributes, a service upon whom would satisfy the requirement of the statute, we think it follows that the failure to give notice to him cannot be excused by showing that the corporation had actual notice and suffered no harm. *Crocker v. Hartford*, 66 Conn. 387, 390, 391. See *Amy v. Watertown*, 130 U. S. 301, 316, 317; *McCall v. Byram Manuf. Co.* 6 Conn. 428, 435. *Exceptions overruled.*

COMMONWEALTH vs. JOHN F. ELDER.

Hampshire. September 20, 1898. — November 22, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

. *Arson — Indictment — Variance.*

Where, in an indictment under Pub. Sts. c. 203, § 2, the averment is of a burning of a "barn of the property of one S. then and there situate and being within the curtilage of the dwelling-house of him, the said S., there also situate," and the proof is that the barn was the property of S. situated within the curtilage of a dwelling-house owned by him, but in which he had never dwelt, and which at the time of the burning was occupied by his tenant, who dwelt with his family in the house and occupied the barn and the curtilage, there is no variance between the allegation and the proof.

INDICTMENT for arson. At the trial in the Superior Court, before *Fessenden, J.*, the defendant requested a ruling, based on an alleged variance between the averments and the proof, which the judge refused to give, and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions. The nature of the ruling requested appears in the opinion.

W. H. Edwards, (*W. H. Feiker* with him,) for the defendant.
J. C. Hammond, District Attorney, for the Commonwealth.

BARKER, J. In this indictment, under Pub. Sts. c. 203, § 2, the averment was of a burning of a "barn of the property of

one Sarah L. Wright then and there situate and being within the curtilage of the dwelling-house of her, the said Sarah L. Wright, there also situate," and the proof was that the barn was the property of Sarah L. Wright, situated within the curtilage of a dwelling-house owned by her, but in which she had never dwelt, and which at the time of the burning was occupied by her tenant, who dwelt with his family in the house and occupied the barn and the curtilage.

The indictment alleged all the elements of a statute offence, of which the proof showed the defendant guilty. The averment and the proof were that he burned the barn of another within the curtilage of a dwelling-house.

Whether there was a variance depends upon whether the words "within the curtilage of the dwelling-house of her, the said Sarah L. Wright," are an averment that the barn was within the curtilage of a dwelling-house in which Sarah L. Wright then lived. There is no reason why they must be so construed. The offence is statutory, and while the facts that the barn was the barn of another and that it was within the curtilage of a dwelling-house must be averred, there is no statute requirement that the dwelling-house must be alleged to have been the dwelling-house of the person who there dwelt. On the contrary, the offence is one in relation to real estate, and the provisions of Pub. Sts. c. 214, § 14, are applicable, under which in such prosecutions it is enough if it is proved on the trial that when the offence was committed "either the actual or constructive possession or the general or special property" was in the person alleged to be the owner. See *Commonwealth v. Wade*, 17 Pick. 395, 398.

Neither *Commonwealth v. Barney*, 10 Cush. 478, nor *Commonwealth v. Hayden*, 150 Mass. 332, governs the present case. In *Commonwealth v. Barney* the contention was whether the building was a dwelling-house within the meaning of the statute, and not whether there was a variance between the proof and the allegation that it was the dwelling of its owner. The house had not been dwelt in for months, and was the dwelling of no one. So in *Commonwealth v. Hayden* the house was not occupied as a dwelling-house at the time of the burning, and for that reason was not a dwelling-house within the meaning of the statute;

and it was not the dwelling-house of Thayer, as alleged, because it was not a dwelling-house within the meaning of the statute.

In the present case the alleged dwelling-house within the curtilage of which the barn was burned, being actually inhabited by a family of persons, was a dwelling-house, and the averment that it was the dwelling-house of the owner was satisfied by the proof that it was an actual dwelling, and of her ownership.

Exceptions overruled.

PATRICK H. BOWLER vs. FRANK O'CONNELL.

Hampden. September 29, 1898. — November 22, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Injury from Kick of Horse — Action — Instructions.

If a young boy is injured by the kick of a horse, which he is approaching, not as a traveller on the way, but for the purpose of reaching and touching him, in an action against the owner of the horse for the injury, it being in dispute whether the accident occurred on the sidewalk of the way or in the defendant's adjoining barnyard, the defendant is entitled to a ruling that the "question of the sidewalk" is immaterial.

TORT, for personal injuries occasioned to the plaintiff by being kicked by the defendant's horse, through the alleged negligence of the defendant. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

The injuries were received on February 12, 1891, when the plaintiff was five years of age. The plaintiff lived in a house owned by the defendant's father, on Linden Street, in Holyoke, close to the barn hereinafter referred to. The defendant testified that the horse was two years old.

The plaintiff testified, among other things, as follows:

"I remember an accident happening to me about six years ago; the barn belonging to Daniel O'Connell, the father of Frank O'Connell, was n't far from my house. From the yard of my house I could see into the yard of the barn; I was acquainted at that time with Frank O'Connell. On the day of the accident I went to school; I got out of school that day about three

o'clock; when I got out of school I started to go home; as I started home I met Charles O'Connell; I walked along with him; he was going in the direction of my home; when we got to Linden Street Charles said, 'Go over and ask your auntie if she won't leave you out with me a little while.' At this time I was living with my aunt and uncle on Linden Street; I went and asked her and she said I might, and he was waiting for me at the corner of Hampden and Linden Streets; then we went up to the barn. As you go along up Hampden Street towards the barn door there is a gate that separates the sidewalk from the O'Connell yard and there is a fence all the way along the sidewalk. I asked him if he had a bell for my sled and he said when he should get up to the barn he would see; when he got up to the barn he went up in the loft and looked for one for me, and he came down and said he could n't find any, but when the teams should come home he would get me one. In the mean time, I was waiting down at the barn, on the barn floor; after that he went into the office. About the time he went into the office I saw Frank O'Connell leading a horse on the sidewalk; he brought this horse to the front of the barn; he watered the horse there; while he was watering the horse, he said something to me and I to him; when he got through watering the horse he started down the sidewalk; he said something more to me as he was going down the sidewalk; this horse was not harnessed up or anything of that kind in the way of a harness; the horse had on a halter, and a rope was attached to the halter; Frank was leading the horse by a rope; he was going down the sidewalk towards the gate that leads into the yard; as he walked along down the sidewalk he asked me if I liked horses, and I told him I did. He says, 'Would you like to have a ride on this horse?' I says yes. He says, 'Come along and I will give you a ride.' At this time he was pretty near the gate when he said, 'Come along, I will give you a ride.' I ran up to get a ride; he stopped the horse; before I ran up I was about five or six feet from the horse's heels; as I ran up to get a ride, the horse kicked up and hit me in the eye; he knocked me down; I struck on the sidewalk on the back of my head; I do not remember anything after that until I found myself at home."

On cross-examination he testified as follows:

"He asked me if I wanted a ride, and I said I did, and I started forward to get the ride, and as I got pretty near the horse kicked up. When I got close to the horse, he kicked up; Frank was leading the horse all the time he was talking with me; not while I was running forward to get the ride; he stopped the horse when he told me to come up and get a ride. The horse had been stopped until I got up to the horse; it was n't long, and I was about as far away from him as from that [showing] to me, and I ran up to get my ride."

The defendant testified, among other things, as follows:

"He [the plaintiff] asked me if I would give him a ride on a horse that was there in the barn. I told him I would, and took him and put him on the horse's back for a minute or so, and took him down and told him to go home. I was waiting to take care of my horse, and he went along towards this place by the watering trough; I picked out my horse and gave him a drink and took him around or started to take him to his stall, and after entering the gate, and down somewhere about twenty feet from the walk, the horse made a kind of a little lunge forwards, and I looked behind, and Patrick was there just in the act like that [showing], reaching out towards the horse's tail, and before I could say a word to him the horse had kicked him in the eye."

On cross-examination he testified as follows:

"I did n't go down the front way and down to the gate, as Patrick says, and lead my horse in there; I fetched the colt out and not in; I led my horse down from the barn to the yard; I didn't lead him down the sidewalk, but I had in previous days. I took the road this day; it was n't a customary thing for me to go over the walk; I did n't see whether he was out of the barn after I told him I wanted him to go home; did n't look to see whether he had gone home; did n't see Patrick at all; the next time I saw him was in the yard right back of the colt; I saw him reaching out as if he was going to take hold of the colt's tail with his right hand; I remember that, and right there at the same instant the colt lunged forward with his head and lunged upwards with his heels; the colt lunged before I saw Patrick; he made this lunge, and I looked back and saw Patrick reaching out with his hands, I should think, as if to take hold

of his tail. He was kicked in the right side of his head; he was right close to the horse at that time; he could n't have been over a foot and a half or two feet away; I couldn't say whether he had hold of the tail or not; I was on the left side of the horse; that is, my right hand was in the halter. When I turned, I turned my head toward the horse; I turned round this way [showing], and could see back there, and could see Patrick back of the horse reaching his hand to take hold of the tail."

No other person saw the accident, and there was no further evidence of the actual occurrence of the accident.

One Knowles, an uncle of the plaintiff, and one O'Connor, testified for the plaintiff that the defendant stated to them after the accident that he was leading the horse along the sidewalk, and that a load of wood or something went by, he guessed, and frightened the horse, and he heard a cry, and looked back, and saw the plaintiff on the sidewalk. O'Connor also testified that the defendant said the accident occurred on the road.

John O'Connell, a brother of the defendant, testified for the defendant that he was at the office window in the barn and saw the defendant go by; that the defendant was in the middle of the road, going toward the gate, leading the horse along; and that he did not see the plaintiff.

At the conclusion of the evidence, the defendant requested the judge to instruct the jury that, upon all the evidence in the case, the plaintiff was not entitled to a verdict; that there was no evidence of the negligence of the defendant; and that the question of the sidewalk was immaterial in the case.

The judge declined to give the instructions asked for, and, among other things, instructed the jury as follows:

"So far as the sidewalk is concerned, that makes no difference except this, the streets are made for the purpose of public travel, the sidewalks are considered to be for travel by persons on foot. Now, if the horse was on the sidewalk, that makes no difference. That is, the fact that the horse was where it ought not to be makes no difference in this case, unless that fact, simply from being a fact, was the real cause or one of the contributing causes of the accident. That fact itself, if it has nothing to do with the accident, is not negligent, or anything which would make the defendant liable. Now, a boy of that age had a right to travel

in the street or on the sidewalk. Of course, he would have no right to run into danger purposely or heedlessly, although some one else was doing wrong; but if the boy, instead of being a traveller on the street, was following the horse, wherever the horse might go, . . . then the fact that the horse was on the sidewalk was immaterial in this case. But if it was the horse's being on the sidewalk and the boy being a traveller on the sidewalk caused the injury, you take that into account. I want to draw a distinction whether the boy was a traveller on the street in the ordinary sense, and not for the purpose of following the horse, or whether or not he was following the horse. If his purpose was simply to follow the horse, then it makes no difference whether he was on the sidewalk or in the middle of the street. But you will have a right to take it into account if he was simply going along the sidewalk for any purpose but following the horse."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. B. O'Donnell, for the defendant.

W. H. Brooks, (*W. Hamilton* with him,) for the plaintiff.

HAMMOND, J. At the close of the evidence the defendant requested the court to rule, first, that there was no evidence of negligence of the defendant, and, secondly, that the question of the sidewalk was immaterial. The court declined so to rule, submitted the question of negligence to the jury, and instructed them in such a manner as to indicate that in certain aspects of the case "the question of the sidewalk" might become material, closing this part of his charge as follows: "I want to draw a distinction whether the boy was a traveller on the street in the ordinary sense, and not for the purpose of following the horse, or whether or not he was following the horse. If his purpose was simply to follow the horse, then it makes no difference whether he was on the sidewalk or in the middle of the street. But you will have a right to take it into account if he was simply going along the sidewalk for any purpose but following the horse."

We think the second instruction should have been given. Whether the accident occurred upon the sidewalk or in the barnyard was in dispute, but both sides agreed that at the time the plaintiff was injured he was approaching the horse, not as a

traveller, but for the purpose of getting to him and with the intention of touching him.

The plaintiff in his examination in chief testified as follows: "He [defendant] says, 'Would you like to have a ride on this horse?' I says yes. He says, 'Come along, and I will give you a ride.' At this time he was pretty near the gate when he said, 'Come along, I will give you a ride.' I ran up to get a ride; he stopped the horse; before I ran up I was about five or six feet from the horse's heels; as I ran up to get a ride, the horse kicked up and hit me in the eye." And on cross-examination as follows: "He asked me if I wanted a ride, and I said I did, and I started forward to get the ride, and as I got pretty near the horse kicked up." And also: "The horse had been stopped until I got up to the horse; it was n't long, and I was about as far away from him as from that [showing] to me, and I ran up to get my ride."

The defendant testified thus: "The horse made a kind of a little lunge forwards, and I looked behind, and Patrick was there just in the act like that [showing] reaching out towards the horse's tail, and before I could say a word to him, the horse had kicked him in the eye." And on cross-examination as follows: "I saw him reaching out as if he was going to take hold of the colt's tail with his right hand. I remember that, and right there at the same instant the colt lunged forward with his head and lunged upwards with his heels; the colt lunged before I saw Patrick; he made this lunge, and I looked back and saw Patrick reaching out with his hands, I should think, as if to take hold of his tail." And also: "I turned round this way [showing], and could see back there, and could see Patrick back of the horse reaching his hand to take hold of the tail."

No other witness saw the accident.

The testimony of Knowles and O'Connor concerning the admission of the defendant is not inconsistent with this upon the question whether the plaintiff at the time of the accident was approaching the horse with the intention of touching him.

It is plain, we think, upon the whole evidence, that there was nothing to warrant a verdict that the plaintiff was injured as a traveller upon the highway, and in disregard of his rights as such traveller. Therefore, the "question of the sidewalk" was not at all material.

Exceptions sustained.

CLIFFORD A. COOK, administrator, *vs.* HENRY J. HAYWARD
& others.

Worcester. October 5, 1898. — November 22, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Will — Vested Remainder.

A testator gave by will two hundred dollars each to his sons H. and W., and to his wife all the remainder of his personal estate, with the real estate occupied as a homestead. He then gave her a life estate in the remainder of his real estate, providing as follows: "Furthermore, at the decease of my said wife I hereby give . . . to my son W. the sum of five thousand dollars to be paid to him at the decease of my said wife." He then provided that, after the decease of his wife and the payment of the five thousand dollars to W. "out of my estate, in the which the life estate is given to my said wife, I hereby give . . . the use . . . of what shall then remain thereof in equal shares" to H. and W. during life and at the decease of H. one half in fee to his heirs and after the decease of W. "the other undivided half part to his heirs." The wife and two sons survived the testator, and W. died before the wife. *Held*, on the death of the wife, that the legacy of five thousand dollars vested on the death of the testator, and that the administrator with the will annexed was to sell so much of the real estate as might be necessary to produce this sum, with interest from the decease of the widow, and pay the same to the administrator of the estate of W.

PETITION to the Probate Court, by the administrator *de bonis non* with the will annexed of Bainbridge Hayward, for instructions as to the construction of the will. The judge entered a decree that the legacy of five thousand dollars given to William B. Hayward after the decease of the testator's widow vested at the decease of the testator; and Henry J. Hayward and others appealed to this court. Hearing before Allen, J., who reserved the case for the determination of the full court. The facts appear in the opinion.

F. B. Smith, for Henry J. Hayward.

C. M. Rice, for the administrator of the estate of William B. Hayward.

KNOWLTON, J. The testator, Bainbridge Hayward, by his will gave legacies of \$200 each to his sons Henry J. Hayward and William B. Hayward, and gave to his wife Martha Hayward all the remainder of his personal estate, with the real estate which he occupied as a homestead. He then gave her a

life estate in all the remainder of his real estate. His will then proceeds as follows: "Furthermore, at the decease of my said wife, I hereby give, devise, and bequeath to my son William B. Hayward the sum of five thousand dollars to be paid to him at the decease of my said wife out of the estate of which I have given the life estate to my said wife Martha Hayward. Furthermore, after the decease of my said wife Martha Hayward and after the payment of said five thousand dollars to my son William B. Hayward, out of my estate, in the which the life estate is given to my said wife, I hereby give, devise, and bequeath the use, occupation, and improvement of what shall then remain thereof in equal shares to my said children, Henry J. Hayward and William B. Hayward, for and during their lifetime, and at the decease of my son Henry J. Hayward, one half in fee to his heirs, and after the decease of my son William B. Hayward the other undivided half part to his heirs." His wife and two sons survived him, and his son William B. Hayward died before his wife Martha Hayward, who has since deceased. The only question in the case is whether the legacy of \$5,000 payable to William B. Hayward after the decease of Martha Hayward lapsed, or whether it goes to William B. Hayward's representatives.

We think it pretty plain that it vested on the death of the testator, although the payment of it was postponed until after the decease of the testator's widow. It seems to be the ordinary case of a gift of a remainder after a life estate, and it should be held to have vested at the death of the testator unless he plainly indicated an intention that it should not vest until the happening of the later event on which it was to become payable. *Wardwell v. Hale*, 161 Mass. 396, 399. *Eldridge v. Eldridge*, 9 Cush. 516. *Shattuck v. Stedman*, 2 Pick. 467. *Peck v. Carlton*, 154 Mass. 231. *Whall v. Converse*, 146 Mass. 345. *Cummings v. Cummings*, 146 Mass. 501. *Loring v. Carnes*, 148 Mass. 223, 225. The grounds on which it is argued that the legacy of \$5,000 could not vest until after the death of the widow would furnish a foundation for an argument no less strong that the gift of the residue to Henry J. Hayward and William B. Hayward could not take effect because of the death of William B. Hayward before the decease of his mother, which made it impossible to pay him the legacy of \$5,000, without the payment of which

the residuary clause could not take effect. Evidently the testator never contemplated such a result.

By the terms of the will the legacy is made payable at the decease of Martha Hayward, and the representatives of the legatee are entitled to interest upon it from that time. Inasmuch as the payment is to be made from the proceeds of the real estate, it is the duty of the administrator *de bonis non* with the will annexed, to sell so much of the real estate as may be necessary to produce this sum with interest, and to make payment thereof to the administrator of the estate of William B. Hayward.

Decree of Probate Court affirmed.

**CATHARINE McDERMOTT vs. WARREN, BROOKFIELD, AND
SPENCER STREET RAILWAY COMPANY.**

Worcester. October 6, 1898. — November 22, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

*Companies for the Transmission of Intelligence by Electricity — Damages to
Landowner by Construction of Street Railway in Highway — Statute.*

Section 4 of Pub. Sts. c. 109, relative to assessing damages of the owners of land near highways along which lines are constructed by companies for the transmission of intelligence by electricity, as amended by St. 1884, c. 806, which extends its provisions in certain cases to "electric light and electric power lines," is not applicable to ordinary street railways which use electricity as a motive power.

CONTRACT. The declaration was founded on an award of the selectmen of Brookfield assessing damages on the plaintiff's petition against the defendant corporation for the construction of an electric railway in the usual manner along and upon the highway opposite the plaintiff's land. Section 4 of Pub. Sts. c. 109, provides that an owner of land near to or adjoining a highway along which lines are constructed by companies for the transmission of intelligence by electricity may apply to the mayor and aldermen or selectmen to assess damages, if any.

The defendant demurred to the declaration, the principal ground thereof being that the selectmen had no jurisdiction to entertain the plaintiff's petition and make an award in her favor. *Hopkins, J.* sustained the demurrer, and found for the defendant; and the plaintiff appealed to this court.

J. R. Thayer & A. P. Rugg, for the plaintiff.

N. S. Myrick & J. A. Brackett, for the defendant.

KNOWLTON, J. The principal question in the case is whether Pub. Sts. c. 109, § 4, amended by St. 1884, c. 306, is applicable to ordinary street railways which use electricity as a motive power.

This chapter of the Public Statutes, prior to its amendment, related only to "companies for the transmission of intelligence by electricity." The amendment above referred to extends the provisions of § 4, allowing the assessment of damages in certain cases to "electric light and electric power lines." At the time of the enactment of this amendment electric railways were not known, or at least were not in common use. In the statute as amended there is no reference to street railways. The statute in regard to street railways is Pub. Sts. c. 113, and it contains elaborate provisions authorizing the construction and operation of such railways. By § 39 of this chapter it is provided that "a street railway company may use such motive power on its tracks as the board of aldermen of cities, or the selectmen of towns, through which it is located, may from time to time permit." Under this provision, in recent years, street railways generally have adopted electricity as their motive power. In *Howe v. West End Street Railway*, 167 Mass. 46, 48, it is said that "the statutes of the Commonwealth make no provision for compensation to abutters when an electric railway is laid in a public way," etc., and we are of opinion that the Legislature did not intend by the St. of 1884, c. 306, § 1, to abridge the rights of street railway companies, or to affect them in any way. It seems rather that companies for the production and sale of electric power, or of electric light, were intended to be brought within the provisions of the statute. While electric railways use electric power, they are not properly called electric power companies. Their use of power is only in their own business of maintaining and operating railways for the transportation of

passengers or freight. In the same way they use electric light for the illumination of their cars, but they are not for either of these reasons electric power companies or electric light companies. They are not in the business of manufacturing or furnishing electric power or electric light for others.

We are of opinion that the statute relied on is inapplicable to the facts stated in the petition, and that it gives the selectmen no jurisdiction to act upon the petition. It follows that their action was without warrant in law, and that their award was void. *Lawrence v. Smith*, 5 Mass. 362. *Riley v. Lowell*, 117 Mass. 76. *Custy v. Lowell*, 117 Mass. 78.

Judgment affirmed.

MAMIE SHANE vs. MARY J. LYONS.

Essex. November 1, 1898. — November 22, 1898.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Assault by Husband as Agent of Wife committed in her Absence.

A married woman is civilly responsible for personal injuries inflicted not in her presence upon a third person by her husband while acting within the scope of his authority as her agent.

TORT, for an assault and battery committed by the husband of the defendant upon premises owned by her. At the trial in the Superior Court, before *Lilley*, J., it appeared that the husband of the defendant was her authorized agent for the care of her real estate; that at the time of the alleged assault and in the commission thereof he was acting within the scope of his authority as such agent, and that she was not then present. The defendant requested the following rulings: "The defendant in this case being the wife of the person committing the alleged assault cannot be held responsible therefor, because of the fact that she is his wife; that is to say, a wife cannot be held legally responsible for an assault committed by her husband, whether her husband was at the time her lawful agent for certain purposes, such as the care of her real estate, or not."

The judge refused so to rule; and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

C. H. Poor & E. B. Fuller, for the defendant.

D. B. Kelly & J. F. Batchelder, for the plaintiff.

HAMMOND, J. The only question is whether a married woman can be civilly responsible for personal injuries inflicted not in her presence upon a third person by her husband while acting within the scope of his authority as her agent.

The act of the agent is the act of the principal, and she must be held unless there is something in the relation of husband and wife which takes the case out of the general rule.

It is contended by the defendant that, while the wife is liable for assaults and other torts committed by her when not acting under the coercion of her husband, she is not so liable when acting under such coercion, and that, as the husband was present at the time of this assault, she herself, if she had been personally present and had actually joined in the assault, would have been presumed to have acted under coercion, and so would not have been liable, and that *a fortiori* she ought not to be held liable when absent.

But this presumption of coercion is simply a presumption which may be rebutted by evidence, and a wife may be held responsible, either criminally or civilly, for assaults committed of her own free will and while actually under no coercion from her husband, even although he be present and join therein. *Commonwealth v. Egan*, 103 Mass. 71. *Handy v. Foley*, 121 Mass. 259, and cases cited. *Ferguson v. Brooks*, 67 Maine, 251.

Our statutes have given to a married woman the right to hold, manage, and dispose of her property in the same manner as if she were sole, and a necessary consequence of this enlargement of her power is a corresponding increase of her responsibility for all acts relating thereto and growing out of her management and control. If she appoints her husband as her agent in such a matter, and in making such appointment acts of her own free will and without coercion from him, we see no reason for regarding her as incapable of authorizing any act to be done by him in her name, and on her behalf, or for shielding her from responsibility.

It must be held that whatever is done within the scope of the agency is done by her authority.

Exceptions overruled.

FRANK W. BLAIR vs. TELEGRAM NEWSPAPER COMPANY
& another.

Worcester. October 3, 1898. — November 23, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Corporation — Equity — Vagueness of Allegations — Demurrer.

A bill in equity, by a minority stockholder against a corporation and a majority stockholder, to compel the latter to restore to the corporation money appropriated by him, alleged that the defendant's salary was fixed at fifty dollars a week when the corporation was organized; that there were three directors, the plaintiff, the defendant, and one B.; that the defendant from June, 1891, to May, 1896, appropriated to himself under the pretence of salary one hundred dollars per week, without the knowledge of the other directors; that when he found it out the plaintiff protested; that the defendant then called a directors' meeting in May, 1896, and procured the majority of the directors to pass a vote making his salary one hundred dollars a week from June, 1891, and approving the payments already made; that the plaintiff protested in writing, and demanded of the defendant that he pay back to the corporation the amount he received in excess of fifty dollars, which he refused to do; and by an amendment to the bill, that the defendant had appropriated a large amount of funds of the corporation to his own use, the details of which the plaintiff was unable to give, because the defendant concealed the financial affairs and books of the corporation. *Held*, on demurrer, that enough was alleged in the bill, as amended, to require the defendants to answer the bill as to the salary of one hundred dollars per week received by the defendant stockholder from June, 1891, to May, 1896.

BILL IN EQUITY, filed January 4, and amended May 12, 1897, in the Superior Court, against the Telegram Newspaper Company, a corporation, and Austin P. Cristy, to compel the latter to restore to the corporation money appropriated by him, alleging that Cristy was a majority stockholder in the corporation, the balance of the stock being owned by the plaintiff and one Bassett, and all three being directors therein. The defendants demurred to the bill, assigning various grounds of demurrer. *Dunbar*, J. overruled the demurrers; and, the defendants having appealed, reported the case for the determination of this court. The facts appear in the opinion.

S. L. Whipple & H. W. Ogden, (*D. Manning* with them,) for the defendants.

F. P. Goulding, (*W. C. Mellish* with him,) for the plaintiff.

FIELD, C. J. The allegations of the plaintiff's bill are so meagre that it is impossible to decide upon demurrer the most important questions which have been argued. The bill alleges that "at the time of the incorporation, to wit, in June, 1890, the salaries of said Cristy and plaintiff were fixed at fifty and thirty dollars per week respectively, and remained at that rate thereafter until the sixth day of June, 1896." It is not alleged in what manner or by what authority the salaries were so "fixed," but we are inclined to construe this averment to mean that the salaries were fixed at these sums by some lawful authority, and that the salaries remained so fixed until June 6, 1896, which is undoubtedly a mistake for May 6, 1896. The bill also alleges as follows:

"IV. On the first day of June, 1891, without the knowledge of the plaintiff, and without any vote of the directors, or any knowledge of the directors, except the knowledge of said Austin P. Cristy, the said Cristy began to appropriate to himself, under the pretence of salary, the sum of one hundred dollars each week, and continued to appropriate that sum of money up to May, in the year 1896, the time of the passing of the vote hereinafter referred to.

"V. Inasmuch as the said Austin P. Cristy kept all the financial transactions of the said corporation concealed from the other members of the corporation, the plaintiff had no knowledge until long after said first day of June, 1891, that the said Cristy was appropriating said sum of money to himself as his salary, and did not learn of the same until long afterwards, and as soon as he learned thereof he at once protested to said Cristy against the said act as illegal and unjust, and as a fraud upon him as a minority stockholder in said corporation.

"VI. Thereupon, upon the sixth day of May, 1896, the said Austin P. Cristy called a meeting of the directors of said corporation and procured the majority of said directors to pass the following vote, to wit: 'Voted, That the salary of A. P. Cristy as president, treasurer, manager, and editor be one hundred dollars each week, the said salary to begin with June 1, 1891, and that the said salary of one hundred dollars per week which A. P. Cristy has already received from this company since June 1, 1891, is hereby expressly approved and confirmed by this

board of directors, its said approval to be entered upon its records.' ”

At the same time the plaintiff offered the following protest in writing, and spread it upon the records of said corporation, to wit: “Frank W. Blair, a stockholder and director of the Telegram Newspaper Company, protests against the action of the directors in voting to pay back salary to Austin P. Cristy from June 1, 1891, to date, on the ground that it is illegal and in violation of justice and equity.” .

It does not appear by the bill whether the corporation has or ever had any by-laws. The Pub. Sts. c. 105, § 4, provide that “Every corporation . . . may . . . elect in such manner as it may determine all necessary officers, fix their compensation and define their duties and obligations,” etc. It does not appear by the bill that the directors had been given by the stockholders any authority to fix the compensation of officers. The plaintiff, however, complains of the vote of the directors only on the ground, as we understand the bill, that “it is illegal and in violation of justice and equity,” in “voting to pay back salary to Austin P. Cristy from June 1, 1891, to date” of the vote. As it does not appear that there were any by-laws, or that any action of the stockholders had been taken on the subject of salaries, it is impossible to say that it appears on the face of the bill that this vote of the directors was authorized by the stockholders, although it is equally true that it does not appear that the stockholders never authorized the directors to pass such a vote. The bill merely alleges that the vote, so far as it relates to the back salary, was illegal; but the plaintiff apparently admits that the vote was legal as to future salary. The bill is certainly “vague and uncertain” on the subject.

The bill as originally filed complained only of the receipt by Cristy of a salary at the rate of \$100 per week from June 1, 1891, to May 6, 1896. The only suggestion in the bill of any other misappropriation of the funds of the corporation by Cristy appears in the prayer of the bill, which is “that an account may be taken of the applications and appropriations said defendant Cristy has made of the funds of the corporation to other purposes for his own private use,” etc. The plaintiff amended the bill by alleging “that the said defendant Cristy has appropriated

a large amount of the funds of said corporation to his own private use, the details and particulars of which the plaintiff is unable to state because the said Cristy conceals from him the financial affairs and the books of said corporation," etc. Such a charge, we think, is too general and vague. *Nye v. Storer*, 168 Mass. 53. It is consistent with the plaintiff's having no definite knowledge even by way of information on the subject, and the bill cannot be maintained simply for the purpose of fishing for information on subjects on which the plaintiff has no definite knowledge or information. The demurrers, however, are not to a part of the bill.

The allegations of the seventh paragraph of the bill perhaps may be so construed as to show that the plaintiff had taken, under the circumstances stated, before bringing this suit, all practicable steps to induce the corporation to bring a suit.*

Assuming, as we must in a hearing on demurrer after the amendment of the bill, that it is true that Cristy has concealed from the plaintiff "the financial affairs and the books of the corporation," we are inclined to the opinion that enough has been alleged to make it necessary for the defendants to answer the bill in regard to the salary of \$100 per week received by Cristy from June 1, 1891, to May 6, 1896. Sufficient facts are not set out in the bill as amended to enable us to determine the questions whether the stockholders have authorized or legally could have authorized the directors to pass the vote of May 6, 1896, or whether the defendant Cristy can lawfully retain the \$50 per week alleged to have been received by him beyond his salary as originally established from June 1, 1891, to May 6, 1896.

Demurrers overruled.

* This paragraph alleged as follows: "The plaintiff has demanded of said Cristy that he should pay back into the corporation the said back pay and salary in excess of the amount fixed at the time of the incorporation of the company, which he has refused to do."

GEORGE J. RAYMOND vs. CITY OF WORCESTER.

Middlesex. October 5, 1898. — November 23, 1898.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Tax — Evidence of Ownership of Property — Action — Finding.

Upon the facts of this case, which was an action to recover the amount of a tax assessed to a firm upon a stock of goods, and demanded of and paid by the plaintiff under protest, the judge, sitting without a jury, was warranted in finding that the plaintiff was the owner of the goods assessed, or had such an interest in them as to be liable for the tax.

CONTRACT, to recover the amount of a tax assessed upon a stock of goods in the defendant city, and demanded of and paid by the plaintiff under protest. Trial in the Superior Court, without a jury, before *Richardson, J.*, who allowed a bill of exceptions, in substance as follows.

The tax was on personal property, and was assessed as of May 1, 1891, against George J. Raymond and Company.

The plaintiff testified that he resided in Cambridge in May and June, 1896; that in May, 1891, he resided in the same place, and was not the owner of any stock in trade in the defendant city in 1891; that he was the manager of the firm doing business as George J. Raymond and Company; that Hattie D. Raymond composed that firm; that prior to May 1, 1891, she had been doing business under that name in the defendant city, possibly for six months or a year; that she had been doing business under that name in other places, and was so doing at that time; that as manager of the firm of George J. Raymond and Company the plaintiff was supposed to draw two thousand dollars a year; that he drew money from the business as he needed it to live on; that at no time did he have any property in the defendant city; that Hattie D. Raymond had purchased the property in that city six months to a year before the levying of the tax; that up to the time of the levy she had made only one purchase, and that consisted of the stock of Whidden, Burdett, and Young, which was bought of Horace Partridge and Company; that the property in the store in the defendant city upon which the tax

was levied consisted of what there was left of the stock bought of Horace Partridge and Company, and also other property that had been bought by Hattie D. Raymond and put into the store; that he did not pay any money that went for the purchase of any of the goods in the store; that he never heard of the tax, and no tax bill ever came to him until it was presented to him by a constable in Boston in 1896; that he had never heard of any demand for taxes on the property at all; that the date of the payment of the tax was May 21, 1896, and the payment of it was made to a constable of Boston; that just prior to the time there was a protest in writing made; and that he took a receipt for the money.

Upon cross-examination, the plaintiff testified that he is now the manager of the Raymond Syndicate, a corporation organized under the laws of Maine in 1893; that business had been carried on under the name of George J. Raymond and Company for about ten years prior to 1882; that Hattie D. Raymond, he thought, knew it all the time; that before 1882 he was in the same business, carrying it on in his own name; that he would not say that a sign did not read George J. Raymond and Company; that the bill heads and all letter heads and the checks were in the name of George J. Raymond; that he was carrying on business in Tremont Row, Boston, and had been about nine years prior to 1882, when he went into insolvency; that his business was closed out, and on that account the business was conducted in his wife's name; that he thought that they first began to have stores outside of Boston three or four years before they went to Worcester; that he had never been in business in Worcester before this time in 1891; that they bought out Whidden, Burdett, and Young, who were doing business as the Bay State Clothing Company; that he could not state the exact time when this stock was purchased; that the store had been run as a retail clothing store when he bought it out; that he continued to do business at the same store; that he thought he made an arrangement about hiring the store, and saw one Taylor about it, who might have been the landlord; that one Dalrymple was manager of the store when he bought it, and he continued as the manager after the purchase; that he was not sure whether it was a year or a year and a half before the tax was assessed; that he

never paid any taxes in Worcester ; that he did not know of any taxes being paid on that stock ; that he helped to sell the business out to some one else ; that other people had something to do with it besides himself ; that he represented the owner largely in the sale, possibly fully ; that he was not quite sure whether there was a bank account kept for the store in Worcester ; that Dalrymple deposited money there, if they had a bank account ; that after that stock was purchased he ran it as a retail clothing and gentlemen's furnishing house ; that during the time that he managed the business there the stock was replenished from time to time by consignments to the store ; that he had met Dalrymple, he thought, once or twice before the purchase ; that he did not think that he said anything to Taylor or to Dalrymple about Hattie D. Raymond ; that he did not remember whether or not he used the first person when he made arrangements in regard to purchasing the store, but that he did not think that he mentioned her name ; that it would not be natural where it was not necessary ; that upon one of the various trips to Worcester he engaged Dalrymple to be the local manager there ; that the latter was to have charge largely of the business ; that he thought he sometimes went there as often as once a week, and possibly sometimes only once in two weeks or a month ; that Dalrymple did not have the management of the store ; that the store was managed from Boston ; that the plaintiff usually attended to the advertising ; that he wrote the advertisements usually in Worcester, and had them printed there ; that he would not say that, during his management of the store, he told Dalrymple that his wife had the management of the business, but Dalrymple knew it very well ; that he did not recollect whether there was a married woman's certificate for Hattie D. Raymond filed in Worcester ; that he knew that she filed one in Boston ; that he did not think that he ever saw one of the assessors of Worcester about the assessment of that store ; that he never received the tax bill sent out in 1891 ; that he could not say that he ever told anybody in Worcester, or representing Worcester, that his wife owned the store ; and that he knew that Dalrymple knew it, and it seemed to him that he had told him.

On redirect examination, the plaintiff testified that he did not remember that any question was asked as to who did own

the store ; that Dalrymple's duties at the store were to look out for the general interests of the thing ; that Hattie D. Raymond was his wife, and that he then lived with her in Cambridge, and had for a number of years.

Hiram G. Otis, called as a witness for the defendant, testified that he was chairman of the board of assessors of the defendant city, and had been for eleven years ; that he was familiar in 1891 with the store in question ; that his attention was first called to the store for the purpose of taxation some time in the month of May or June, 1891 ; that he was looking over the record of the assistant assessor, and found that this store "brought in a new name," different from the one he had a year before ; that it was always his custom to go to those places where there was a new tenant, and find out about it ; that he went to this store, and inquired about it ; that he saw a man in the store, and asked for the manager ; and that he finally saw Dalrymple.

Upon cross-examination, the witness testified that the assessment was made as of May 1, 1891.

Ransom C. Taylor, called as a witness for the defendant, testified that he owned the building in which this store was kept ; that some time in 1891 he had some dealing with the plaintiff in regard to hiring the store ; that the plaintiff came before the stock was purchased ; and that he said nothing about anybody being interested in the transaction except himself.

Edgar A. Dalrymple, called as a witness for the defendant, testified that in 1891 he was in the clothing business in the store known as "the Bay State," in the defendant city ; that before 1891 he had been there for five years, the latter part of which time he was manager under Whidden, Burdett, and Young ; that he first saw the plaintiff in connection with that store in February, 1891, at the store ; that he had never seen him before ; that he came with a letter of introduction from the firm of Whidden, Burdett, and Young ; that the witness showed him the store and the stock of goods ; that the plaintiff said he came to look over the stock of goods with the intention of buying them ; that he said he was pleased with it, and wanted to know who the landlord was ; that the witness next saw him several days later, when he came in and said that he had bought the stock, and asked if the witness would remain there ; that the

witness remained, and got ready for a reopening of the store; that some other stock came to the store, directed to George J. Raymond and Company; that sometimes the plaintiff came to the store twice or three times a week, and then again the witness would not see him for two or three weeks; that the witness was hired to look after the store and take charge of it; that that was all that was said at the time when he was hired; that the witness hired the employees, and looked after them in general, from February 1 to October 1, 1891; that he paid local bills that were contracted at the store; that the money left after paying the employees and the local bills was taken to Boston; that there was no bank account kept in Worcester; that the money was taken to Boston, sometimes by himself, sometimes by the plaintiff, or whomever he might send there after it; that the witness remembered the occasion when Otis came into the store; that it was some time in May or June, 1891; and that he took his directions in the management of the store from the plaintiff.

There was evidence tending to show that due notice and demand were made for the payment of the tax in question, which evidence was contradictory.

Enoch H. Town, called as a witness for the defendant, testified that he was the city clerk of Worcester, and had with him the records of his office as to married women's certificates; and that he had no record in 1891 of any married woman's certificate indicating that Hattie D. Raymond was doing business in Worcester.

The plaintiff, at the close of the evidence, requested the judge to rule that he had made out his case; that the defendant had established no defence; and that his finding should be for the plaintiff for the amount of the tax. The judge refused so to rule; found that the plaintiff was the owner of the stock of goods, or had such an interest in them as to be liable for the tax thereon; and found for the defendant. The plaintiff alleged exceptions.

E. R. Anderson, for the plaintiff.

A. P. Rugg, for the defendant, was not called upon.

KNOWLTON, J. At the close of the evidence, the plaintiff requested the court to rule that he had made out his case, and that the defendant had established no defence. The court re-

fused so to rule, and found that the plaintiff was the owner of the stock of goods, or had such an interest in them as to be liable for the tax. The only question presented by the bill of exceptions is whether, upon the evidence, the judge was bound, as matter of law, to find for the plaintiff. It was an undisputed fact that the goods belonged to some one who did business under the name of George J. Raymond and Company. The plaintiff testified that his wife, Hattie D. Raymond, was the sole proprietor of the business and owner of the property of the firm of that name. The contention of the defendant was that this testimony was untrue. The plaintiff admitted that for about ten years prior to 1882 he had carried on business in the name of George J. Raymond and Company in selling clothing and men's furnishing goods; that in 1882 he had a store in Tremont Row in Boston, and went into insolvency; that his business was closed, and that on account of that the business was afterwards conducted in his wife's name; that they began to have stores outside of Boston three or four years before they went to Worcester; that in 1891 they bought out a firm in Worcester that was doing business as the Bay State Clothing Company, and he continued to do business at the same store; that he made the arrangements about hiring the store, and engaged a local manager; that he helped to sell the business to some one else; that he represented the owner largely in the sale, perhaps fully; that he did not think he said anything to Taylor, of whom he hired the store, or to Dalrymple, whom he engaged as local manager, about Hattie D. Raymond. There was other evidence tending to show that in doing the business and making the arrangements in regard to the business, he talked and acted as if he were the sole proprietor, and made no representation or disclosure that his wife had any interest in the property or business. His wife never filed a certificate in Worcester stating that she was doing business as a married woman on her sole and separate account, under the provisions of the Pub. Sts. c. 147, § 11.

Upon all the evidence in the case, the judge might well disbelieve the plaintiff's testimony in regard to his wife's ownership of the property, and find that his mode of dealing with the property truly represented his ownership of it.

Exceptions overruled.

MAURICE P. CLARE, administrator, *vs.* NEW YORK AND
NEW ENGLAND RAILROAD COMPANY.

Worcester. October 6, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

*Personal Injuries — Estoppel — Employers' Liability Act — Death — Time
within which Action must be brought.*

The declaration in an action against a railroad company contained two counts, the first at common law for personal injuries suffered by the plaintiff's intestate, and the second under Pub. Sta. c. 112, § 212, as amended by later statutes for his death. The judgment in a former action between the same parties was rendered on a declaration under the employer's liability act, St. 1887, c. 270, for personal injuries suffered by the plaintiff's intestate and not for his death. The writ in the second action was dated May 17, 1897, and the plaintiff's intestate died on July 21, 1891, and received the injuries which caused his death on July 20, 1891. By Pub. Sta. c. 112, § 212, the action under that section must be "commenced within one year from the time of the injury causing the death." This defence was set up in the defendant's answer. *Held*, that, while the judgment in the first case was not a bar to the prosecution of the present action on the second count, the answer that the action was not begun within the year was a good defence thereto.

TORT, for personal injuries. Trial in the Superior Court, before Bond, J., who, the defendant having pleaded in bar a judgment in a former action, directed a verdict for the defendant on the plea and record; and the plaintiff alleged exceptions, which appear in the opinion.

W. A. Gile, (*F. M. Morrison* with him,) for the plaintiff.

F. P. Goulding & W. C. Mellish, for the defendant.

FIELD, C. J. The declaration contains two counts, the first at common law for personal injuries suffered by the plaintiff's intestate, and the second under Pub. Sts. c. 112, § 212, as amended by later statutes, for the death of the plaintiff's intestate. The judgment in the former action, reported 167 Mass. 39, between the same parties, was rendered on a declaration under St. 1887, c. 270, for personal injuries suffered by the plaintiff's intestate, and not for his death. It is obvious that such a judgment is not a bar to the prosecution of the present action on the second count, as the causes of action are different. The writ in the

present action is dated May 17, 1897, and by the declaration in the first case it appears that the plaintiff's intestate died on July 21, 1891, and that he received the injuries which caused his death on July 20, 1891. Section 212 of the Pub. Sts. c. 112, requires the action under that section to be "commenced within one year from the injury causing the death." This defence, that the action was not commenced within said year, is set up in the answer of the defendant, and is plainly a good defence to the action on the second count.

St. 1887, c. 270, does not take away any cause of action at common law which an employee had against his employer for personal injuries. The employee, or, if he has died after conscious suffering, his administrator, can bring an action for personal injuries, either at common law or under the statute, and by our practice he is permitted to join a count or counts at common law with a count or counts under the statute. *Ryalls v. Mechanics' Mills*, 150 Mass. 190.

The declaration in the former action between these parties contained no count at common law, but it was at the option of the plaintiff whether in that action he would sue at common law or under the statute, or join counts under both. When such counts are joined it may be that the trial court, at some stage of the trial, can in its discretion compel the plaintiff to elect on which of the two classes of counts he will proceed, although this court has held that an election ought not to be compelled when all the counts are under the statute. *Beauregard v. Webb Granite & Construction Co.* 160 Mass. 201. Plainly, a plaintiff should not be permitted to retain verdicts both at common law and under the statute for the same personal injuries, and have judgment for the sum of the two verdicts. A verdict under the statute cannot exceed the sum of \$4,000, while at common law there is no fixed limit to the amount of the verdict, and the statutory notice must be given in order to maintain an action under the statute, while no notice is required to maintain an action at common law. It may happen that the proof is such that there is no evidence to maintain an action at common law, although there is evidence to maintain an action under the statute; or the converse may be true, or there may be evidence for the plaintiff both at common law and under the statute. *Coffee*

v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21.
Lynch v. Allyn, 160 Mass. 248.

The fact, if it be a fact, that the plaintiff at some time or other in the trial may be compelled by the trial court to elect whether he will proceed at common law or under the statute, does not prevent the former adjudication from being a bar to another action between the same parties to recover compensation for the same injury. The alleged cause of action at common law could have been tried in the former action, if the plaintiff had chosen to join a count at common law with a count or counts under the statute, and, if compelled by the trial court to elect, he had elected to go to the jury on the count at common law. The parties are concluded by the judgment in the former action, not only upon the issues actually tried and determined, but upon all issues which might have been tried and determined in that action. *Bassett v. Connecticut River Railroad*, 150 Mass. 178. *Foye v. Patch*, 132 Mass. 105. There are opinions of this court which tend to show that the trial court in its discretion may compel a plaintiff in this class of cases to elect at the close of the evidence whether he will go to the jury on the counts at common law or the counts under the statute. Whether a plaintiff can be compelled to elect before the close of the evidence has not been decided, neither has it been decided that in every case of this class the trial court can or ought to compel the plaintiff to elect. *Brady v. Ludlow Manuf. Co.* 154 Mass. 468. *Murray v. Knight*, 156 Mass. 518. *Conroy v. Clinton*, 158 Mass. 318.

It is settled that, when "a person having a choice of inconsistent remedies for the same injury has once elected one of them, he cannot afterwards seek the other." *Whiteside v. Brawley*, 152 Mass. 133, 134. But in an action like the present the two classes of remedies for personal injuries, viz. at common law and under the statute, are not necessarily inconsistent, yet the plaintiff cannot have both remedies against the same defendant for the same injury. When the facts will support an action at common law as well as under the statute the remedies, as was said in *Connihan v. Thompson*, 111 Mass. 270, "are alternative remedies, but not inconsistent: and remedy in both forms might be sought in one and the same action. If the plaintiff institute

separate actions, he cannot carry both to judgment and satisfaction." See *Bradley v. Brigham*, 149 Mass. 141.

There was on the facts but one cause of action for personal injuries. This could not be split by the plaintiff into two separate causes of action. The judgment in the former action is conclusive upon the whole cause of action for personal injuries, which could have been tried and determined in that action as between the same parties. *Sullivan v. Baxter*, 150 Mass. 261.

Exceptions overruled.

COMMONWEALTH vs. ANSON C. MAGOON.

Worcester. October 7, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Cruelty to Horse — Instructions — Intent.

At the trial of a complaint under Pub. Sts. c. 207, § 53, for cruelty to a horse, the defendant took no exceptions to the instructions to the jury, which were, in substance, that severe pain inflicted upon an animal without justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person occasioning it, is cruel, and the fact that the defendant did not intend to violate the statute is not a defence, if he acted with wanton and reckless disregard of the feelings and suffering of the horse. The defendant excepted to the refusal to give the following rulings which he requested: "1. The motive of a person who inflicts pain upon an animal, in determining the criminality of the act, may be material. Pain inflicted for a lawful purpose, and with a justifiable intent, though severe, does not come within the statute meaning of 'cruel.' 2. If a defendant, in the proper exercise of his own judgment, honestly thinks he is not being unnecessarily cruel, he must be acquitted. 3. It must appear that the defendant knowingly and willingly was unnecessarily cruel." *Held*, that the first request was rightly refused, the instructions given and not excepted to having dealt properly with the defendant's intention, though not in the terms of the request. *Held, also*, that the other requests were also properly refused, as the defendant's guilt did not depend upon whether he thought he was unnecessarily cruel, but upon whether he was so in fact.

COMPLAINT to the Second District Court of Eastern Worcester, under Pub. Sts. c. 207, § 53, alleging that the defendant, on March 26, 1898, "at Boylston, in the County of Worcester, did torture a certain animal, to wit, a horse, by then and there

carrying it in and upon a vehicle in an unnecessarily cruel manner."

At the trial in the Superior Court, before *Dewey, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

M. M. Taylor, for the defendant.

H. Parker, District Attorney, (*G. S. Taft*, Assistant District Attorney, with him,) for the Commonwealth.

BARKER, J. The defendant, having bought a sick horse, carried it upon a wagon some eight or ten miles from the place where he had purchased the horse to his home. He concedes that there was evidence that in carrying the horse it was greatly and unnecessarily injured and wounded, and that from the evidence his intent to be cruel and his knowledge that he was cruel might both be inferred. On the other hand, there was evidence that the horse, although injured and sore when purchased, lay comfortably while being carried, was not injured or wounded by being carried, and gave no signs of suffering while being carried; also that the defendant did all he could for its comfort while carrying it, and that his purpose in buying the horse and carrying it to his home was to cure the horse, and that he did not intend to be cruel to it, or to hurt it unnecessarily, and that in the honest exercise of his judgment he did not think he was unnecessarily cruel in carrying the horse as he did, but thought he was good to the horse and did not want to hurt it.

He took no exception to the instructions given to the jury,* but excepted to the refusal to give the following rulings, which he requested:

"1. The motive of a person who inflicts pain upon an animal, in determining the criminality of the act, may be material. Pain inflicted for a lawful purpose, and with a justifiable intent, though severe, does not come within the statute meaning of 'cruel.'"

* The judge instructed the jury, in substance, that severe pain inflicted upon an animal is cruel, if inflicted without any justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person who occasioned it; and the fact, if it be a fact, that the defendant did not intend to violate the statute is not a defence, if he acted with wanton and reckless disregard of the feelings and suffering of the horse.

"2. If a defendant, in the proper exercise of his own judgment, honestly thinks he is not being unnecessarily cruel, he must be acquitted.

"3. It must appear that the defendant knowingly and willingly was unnecessarily cruel."

The first request is founded upon language used by Mr. Justice Hoar in *Commonwealth v. Lufkin*, 7 Allen, 579, at page 582, in dealing with the right to inflict pain as part of or as incident to an attempted cure, and, while it might properly be given as an instruction if the acts causing pain were part of an attempted cure, it would have been misleading to the jury in the case at bar. The defendant's contention here was that his purpose and intent were to cure the horse, and the ruling requested was calculated to make the verdict turn upon the question whether he intended to cure the horse, while the real issue was whether his transportation of the horse, which was not necessarily any part of an attempted cure, was lawful or criminal. If his acts intended as part of a cure inflicted unnecessary pain, he might be found guilty. The request was rightly refused, the instructions given and not excepted to having dealt properly with the defendant's intention, though not in the terms of the request.

The other requests were also properly refused. The defendant's guilt did not depend upon whether he thought he was unnecessarily cruel, but upon whether he was so in fact. It need not appear that he knew that he was cruel, and that he was willing to be so, but only that he intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain, and so were unnecessarily cruel. *W—— v. W——*, 141 Mass. 495. *Commonwealth v. Gilbert*, 165 Mass. 45, 59. The proper exercise of one's own judgment must, as is pointed out in *Commonwealth v. Wood*, 111 Mass. 408, 411, be distinguished from wantonness or recklessness of consequences.

Exceptions overruled.

MARY MEIGS vs. MARY J. DEXTER.

Plymouth. October 18, 1898. — November 23, 1898.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

Deed — Delivery — Evidence — Exceptions — Insane Delusion — Instructions.

An instruction to the jury, that if the grantor in a deed, "after signing the deed, placed it on the table, or placed it in M.'s hands with the intention that it should become effective and operative, then there was a good delivery of the deed," is erroneous, the evidence tending to show that M. was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away and left it there, not representing the grantee in any way.

If the petitioner for partition of land has introduced evidence tending to show that her relations and those of her son with the husband of the grantor in a deed under which the respondent claimed title to the land had always been friendly, the respondent may put in evidence an expression of the grantor's husband in his last sickness in regard to the petitioner's son manifesting ill feeling towards him.

It is not a ground of exception that testimony relating to an immaterial matter is admitted to contradict the excepting party's evidence on the same point.

At the trial of a petition for partition of land, the judge instructed the jury as follows: "I am requested to give you this instruction, which not without some modification can I do: 'It is not necessary that a person should be insane upon all subjects. It is sufficient to avoid her deed if it appears that she had an insane delusion upon one subject, and acting under the influence of that one delusion made the deed.' I do not think that goes quite far enough. A person may have an insane delusion, I think, on one subject, . . . and yet not be insane on other subjects, and have good mental capacity to do business. The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion, and which renders a person of unsound mind in respect to that thing. . . . If the act is not inspired, moved by that particular delusion, it does not affect their transactions, nor would it affect a deed." *Held*, that the petitioner had no ground of exception.

PETITION for partition of three parcels of land in Mattapoiet. The respondent claimed sole title to one parcel under a deed from Hannah Hall, a sister of the petitioner and aunt of the respondent, and disclaimed as to the other parcels. At the trial in the Superior Court, before *Richardson, J.*, the jury returned a verdict for the respondent; and the petitioner alleged exceptions, which appear in the opinion.

L. LeB. Holmes, for the petitioner.

O. Prescott, Jr., (*H. Kingman* with him,) for the respondent.

KNOWLTON, J. On the question whether there was a delivery of the deed, the judge instructed the jury that if Hannah Hall, "after signing the deed, placed it upon the table, or placed it in Captain Macomber's hands with the intention that it should become effective and operative, then there was a good delivery of the deed." The petitioner excepted to this instruction. The testimony tended to show that Captain Macomber was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away and left it there, not representing the grantee in any way.

We are of opinion that the instruction was erroneous in omitting to embody the requirement that there should be an acceptance of the deed by some one representing the grantee. It is well settled in this Commonwealth that the delivery of a deed is not complete and effectual without an acceptance by the grantee, or by some one authorized to represent him, or who assumes to represent him, and whose act of acceptance is afterwards ratified. *Hawkes v. Pike*, 105 Mass. 560. *Commonwealth v. Cutler*, 153 Mass. 252. *Barnes v. Barnes*, 161 Mass. 381. Although in another part of the charge the general rule was correctly stated, we construe the bill of exceptions as showing that this particular instruction was given to the jury. The counsel on both sides agree in the same construction, and the exceptions must therefore be sustained.

The testimony of the witness Macomber was rightly admitted. The petitioner had introduced evidence tending to show that her relations and the relations of her son Joseph with Larnet Hall, the husband of the grantor in the deed, had always been friendly. The expression of Larnet Hall in his last sickness in regard to her son Joseph was a manifestation of his feelings, which had some tendency to contradict the petitioner's evidence.* If the relations of Larnet Hall to the son of the grantor were immaterial, it is not a ground of exception that testimony was admitted to contradict the petitioner's evidence on this point.

The remaining exception is to this portion of the charge: "I am requested to give you this instruction, which not without some modification can I do: 'It is not necessary that a person should

* The witness testified that Hall spoke about Joseph Meigs, and said, "that damned Joe had been there, and he wished he would keep away."

be insane upon all subjects. It is sufficient to avoid her deed if it appears that she had an insane delusion upon one subject, and acting under the influence of that one delusion made the deed.' I do not think that goes quite far enough. A person may have an insane delusion, I think, on one subject, as on the subject of religion, of politics even, — to make it a little more practical, — and yet not be insane on other subjects, and have good mental capacity to do business. The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion, and which renders a person of unsound mind in respect to that thing. As I say, people may have notions on religion and politics that others think are insane, delusive; but that does not make them so, and that does not render all their business acts void. I dare say you may know men you think are deluded on some subjects, and yet they may be good business men perhaps. If the act is not inspired, moved by that particular delusion, it does not affect their transactions, nor would it affect a deed." As we understand the request and the instruction, this exception should be overruled. If the words in the request, "acting under the influence of that one delusion made the deed," are to be interpreted as meaning made a deed into which the effect of the delusion entered, the request was correct; but if it means made a deed while under the influence of the delusion, which was unaffected by the delusion, it was erroneous. We think the judge stated the distinction rightly when he said: "The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion. . . . If the act is not inspired, moved by that particular delusion, it does not affect their transactions, nor would it affect a deed." The modification of the instruction requested seems to have been for the purpose of preventing a misunderstanding, which would have been probable or possible if it had been given without explanation.

Exceptions sustained.

MERTON F. ELLIS vs. CHARLES S. PIERCE.

Plymouth. October 19, 1898. — November 23, 1898.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

*Personal Injuries — Admission — Weight of Evidence — Negligence —
Question for the Jury.*

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, there was evidence of the plaintiff's mother that the defendant said to her, "I do not want to tell you to sue me, but if it was me I should sue. . . . My machines are all insured, and you will have to sue me to get at the insurance company." *Held*, that the sentence in which he indicated an opinion that he was liable was in the nature of an admission which was evidence against him; but the weight of it might be affected by the fact, if it was a fact, that he was insured.

Where, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, the testimony of the plaintiff was not clear in support of the contention that the defendant failed to perform the duty of keeping the machinery in a condition safe for his employees to work upon it, but some things in his testimony had a slight tendency in that direction, the court said that, considering this testimony in connection with certain admissions of the defendant tending to show his liability, it was of opinion that the case was rightly submitted to the jury.

TORT, for personal injuries occasioned to the plaintiff while working in the defendant's employ upon a moulding machine, moulding out box toes. The declaration contained two counts, one under the employers' liability act, St. 1887, c. 270, and the other at common law. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

F. M. Bizby, for the defendant.

H. Kingman, for the plaintiff.

KNOWLTON, J. The plaintiff's mother testified, without objection, that the defendant said her son was a good workman, and that "his getting hurt was not due to any carelessness of his, and that he was a very steady fellow and attended to his business."

The evidence of the plaintiff's mother that the defendant said to her, "I do not want to tell you to sue me, but if it was me I

should sue. . . . My machines are all insured, and you will have to sue me to get at the insurance company," was competent. What he said about insurance was immaterial. But the statement came as a part of a sentence in which he indicated an opinion that he was liable for the injury to the plaintiff. This was in the nature of an admission which was evidence against him. The weight of it may be affected by the fact, if it was a fact, that he was insured.

There was evidence tending to show that the plaintiff was in the exercise of due care. The only other question in the case is whether there was any evidence of negligence on the part of the defendant. A part of the plaintiff's testimony tended to show that the accident was caused by the slipping of a belt on a pulley. He testified that the belt would sometimes slip, which would occasion the upper part of the machine to come down on the moulder quickly; that he had called the attention of the superintendent to it two or three times, and that he tightened the belt once. The tightening of the belt, if it was too loose, seems to have been a part of the work which devolved on the defendant in the performance of his duty to keep the machinery in a safe condition. The testimony of the plaintiff was not clear and definite in support of the contention that the defendant failed to perform this duty, but some things in his testimony had a slight tendency in this direction. When we consider this testimony in connection with the admissions of the defendant tending to show his liability for the injury, we are of opinion that the presiding justice rightly submitted the case to the jury.

Exceptions overruled.

PIERRE GOUIN vs. WAMPANOAG MILLS.

Bristol. October 24, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Employers' Liability Act — Negligence.

At the trial of an action for personal injuries under the employers' liability act, St. 1887, c. 270, it appeared that the plaintiff and one P. were engaged in a room about sixty feet long and forty feet wide in the defendant's cotton house in moving cotton out towards the door, P. being on the top of a pile of cotton bales and the plaintiff being on the floor near the bottom of the pile; that the space was about half filled with cotton; that the work was simple, both being familiar with it; and that while the plaintiff was rolling a bale with his back towards P., another bale which was thrown down by P. struck him and broke his leg. The plaintiff sought to hold the defendant, on the ground that its superintendent, who was eating his breakfast not far from the pile when the accident happened, had told P. a short time before to "throw down cotton"; but the plaintiff testified differently in different parts of his testimony as to whether the order to throw down cotton was given when the superintendent first ordered them to do this work, or later just before the bale came down. *Held*, that there was no evidence of any order of the superintendent that was more than a command or request to hurry on the work in a proper way, or which made the superintendent or his employer responsible for P.'s negligence in throwing down the bale upon the plaintiff.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration was under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Hammond, J.*, who, at the close of the plaintiff's evidence and at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. W. Cummings & C. R. Cummings, for the plaintiff.

J. F. Jackson & R. P. Borden, for the defendant.

KNOWLTON, J. The plaintiff and a man called Pat were engaged in moving cotton in the defendant's cotton house. Pat was on the top of a pile of cotton bales in a room about sixty feet long and forty feet wide, and the plaintiff was on the floor near the bottom of the pile; they were moving the cotton out towards the door. The space was about half filled with cotton. The work was simple, both of the men were familiar with it,

and neither of them could be supposed by the defendant to need instructions in regard to it. As the plaintiff was rolling a bale of cotton with his back towards Pat, another bale, which was thrown down by Pat, struck him and broke his leg.

The only ground on which the plaintiff seeks to hold the defendant is that its superintendent, Robinson, who was eating his breakfast not far away from the pile when the accident happened, had told Pat a short time before to "throw down cotton." The plaintiff testified differently in different parts of his testimony as to whether the order to throw down cotton was given when Robinson first ordered them to do this work, or later just before the bale came down. However that may have been, the order can only be interpreted as directing Pat to throw down cotton in a proper way, and in a proper place, and not as telling him to throw it down upon the plaintiff when he was standing underneath. It cannot properly be interpreted as a direction to throw down a particular bale in a particular way, without regard to the plaintiff's safety.

The burden being upon the plaintiff, we do not find that there was evidence of any order of the superintendent that was more than a command or request to hurry on the work in a proper way, or which made the superintendent or his employer responsible for Pat's negligence in throwing down the bale upon the plaintiff.

Exceptions overruled.

MARY E. GOLDING vs. INHABITANTS OF NORTH
ATTLEBOROUGH.

Bristol. October 24, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Compensation for Injuries to Land by Change of Grade in State Highway
— *Exclusion of other Remedies by Statute Remedy.*

The remedy given by § 3 of St. 1894, c. 497, entitled "An Act relating to State highways," which section provides that compensation to owners of adjoining lands for injuries to such lands is to be paid by the Commonwealth, after being determined in the manner provided in that section, is adequate and complete, and excludes all other remedies.

PETITION, by the owner of land, to recover compensation for injuries thereto by reason of a change of grade in the adjoining highway. The case was submitted to the Superior Court, and, after judgment for the respondent, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion. If the petition could be maintained, the case was to go to the jury for the assessment of damages; otherwise there was to be judgment for the respondent.

R. P. Coughlin, for the petitioner.

W. H. Fox & F. B. Byram, for the respondent.

HAMMOND, J. The way was laid out as a State highway by the Massachusetts highway commission, and the work for which compensation is sought was done under the direction and control of the commission, acting under the authority of St. 1894, c. 497, entitled, "An Act relating to State highways."

The respondent town, under the authority originally given in St. 1893, c. 476, re-enacted in St. 1894, c. 497, § 4, contracted with the State highway commission to do the work, just as any individual contractor might have done. St. 1894, c. 497, § 3, provides that compensation to owners of adjoining lands for injuries to such lands is to be paid by the Commonwealth, after being determined in the manner provided in that section. This remedy is adequate and complete, and excludes all other remedies.

This is not an action of tort, in which the injured party may sue either the servant who has caused the injury or his master. The work was done under authority of law, and only the statute remedy can be pursued.

Judgment for the respondent.

JOHN BRAYDEN vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Bristol. October 25, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Prescription — Obstructions interrupting Right of Prescription — Invitation to cross Railroad.

If an obstruction to an unauthorized way is put up before the time of prescription has run, the running of the time will be interrupted, although the obstruction is torn down very soon, and the use of the way resumed.

TORT, for personal injuries. Trial in the Superior Court, before *Richardson, J.*, who, at the close of the evidence and at the request of the defendant, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion, and in a note thereto by the reporter.

J. W. Cummings & E. Higginson, for the plaintiff.

F. S. Hall, for the defendant.

HOLMES, J. This is an action for personal injuries suffered by the plaintiff while crossing the defendant's track, in consequence of the explosion of a track torpedo. The plaintiff was travelling along a pathway which crossed the railroad, and which he attempted to maintain was a way by prescription. At the time of the accident there was an opening in the fence through which the plaintiff passed, but it appeared by the testimony of all the witnesses, and was not disputed, that this opening had been obstructed within twenty years, although there was evidence that the obstructions were torn down soon after they were put up. At the trial, the judge directed a verdict for the defendant; and the plaintiff excepted.

We are of opinion that such an assertion of right on the part of the railroad company was sufficient to prevent the gaining of a right of way. A landowner in order to prevent that result is not required to battle successfully for his rights; it is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion

interrupts the would be dominant owner's impression of acquiescence and the growth in his mind of a fixed association of ideas, or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that the acquiescence was not a fact. *Powell v. Bagg*, 8 Gray, 441, 443. *Weld v. Brooks*, 152 Mass. 297, 306. There is no question here on the disputed point whether a merely verbal protest would have an equal effect. Washb. Easements, (4th ed.) 112, 113. Jones, Easements, §§ 193, 194. We shall not consider even such cases as *Connor v. Sullivan*, 40 Conn. 26, where the overt act was stopped in its very beginning.

The counsel for the plaintiff also argued that he had a right to go to the jury on the question whether the obstructions were put up by the railroad company. But this seems to us not fairly open on the exceptions. It is true that the plaintiff's witnesses did not say in terms, as the defendant's witnesses did, that the railroad company put up the obstructions. But their testimony shows that what was done was to nail up or close an opening in the fence along the railroad, and in the evidence there is no suggestion or ground for supposing that any third person officiously interfered. We do not gather that the plaintiff wished to go to the jury on that ground.

There was no evidence of an invitation on the part of the defendant, or of a right of action on the part of the plaintiff without one, if there was no right of way.* *Chenery v. Fitchburg Railroad*, 160 Mass. 211. See also *Wright v. Boston & Albany Railroad*, 142 Mass. 296; *Wabash Railroad v. Jones*, 163 Ill. 167. Our decision makes the questions of evidence immaterial.

Exceptions overruled.

* The counsel for the plaintiff contended that the plaintiff found an opening in the fence; that "it was not broken down"; that he found a regular path right across to a corresponding opening on the other side; that a public street led to this entrance; that he had seen hundreds go through; that the passage had been obstructed for about a year; and that it did not appear that the "convenient use of the road" would be obstructed by a fence at this point, and therefore its absence indicated that the crossing was treated by the defendant as a way of some kind, in view of the provisions of Pub. Sts. c. 112, § 115. The plaintiff claimed a way by prescription since 1883 or 1884.

WILLIAM R. SMITH, assignee, vs. AMERICAN LINEN
COMPANY.

Bristol. October 25, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Insolvency — Preference — Statute.

Accepting a preference in payment for goods sold to an insolvent after his creditors have given him an extension of time is not a bar, under Pub. Sts. c. 167, § 33, to proof of a claim upon a note given for an old debt when the extension was granted.

BILL IN EQUITY, filed March 7, 1898, to revise the refusal of the Court of Insolvency to expunge the proof of the defendant's claim. The case was heard by *Barker, J.*, on the bill, answer, and certain agreed facts, which recited, in substance, that Maurice T. Barlow, being insolvent, was given by his creditors on November 20, 1893, an extension of time for one year that he might continue in business, it being hoped that by so doing he would be able to pay them in full, and it was stated at the meeting that during this time Barlow would pay cash for what he bought; that the defendant, whose claim at that time was \$4,578.51, and the other creditors accepted notes for the amounts of their claims, which notes were from time to time renewed; that the defendant received on November 16, 1894, notice from Barlow, dated November 14, 1894, which notice was also sent to the other creditors, that he was hopelessly insolvent; that on December 18, 1894, he filed his petition in insolvency, and the plaintiff was appointed assignee; that on January 4, 1895, the defendant proved in insolvency its extended claim, making no reference to the cash claim hereinafter referred to; that from November 20, 1893, to November 19, 1894, the defendant sold to Barlow many bills of goods, receiving payment from two to ten days of the time of delivery, these transactions being kept upon the books of the defendant separate from the claim proved by the defendant against Barlow in insolvency; that the only knowledge of the defendant as to the financial condition of

Barlow during the year was that conveyed by the extension of November 20, 1893, and in the notice received on November 16, 1894; that Barlow was still carrying on his business as a dealer in waste on November 30, 1894; that the notes given for the claim proved in insolvency fell due on November 19, 1894; that the defendant and Barlow understood that the transactions in question were for cash, that is, were to be paid for by Barlow within ten days from delivery, and that the sales to Barlow and the payments by him to the defendant relied on as fraudulent preferences were as follows.

1894.	Sales.	1894.	Payments.
Nov. 13	Waste \$245.47	Nov. 23	Cash \$245.47
" 23	286.41	" 23	280.00
" 27	218.13	" 26	6.41
		" 30	218.13
	<hr/>		<hr/>
	\$750.01		\$750.01

A decree was entered that the bill be dismissed; and the plaintiff appealed to the full court.

L. LeB. Holmes, for the plaintiff.

A. J. Jennings & J. M. Morton, Jr., for the defendant.

HOLMES, J. This is a bill in equity, brought under Pub. Sts. c. 157, § 15, by the assignee in insolvency of one Barlow, to revise the refusal of the Court of Insolvency to expunge the proof of the defendant's claim, the ground of the bill being that the defendant has accepted a preference. Pub. Sts. c. 157, § 33. The material facts are these. In November, 1893, Barlow was insolvent, and his creditors gave him an extension of time that he might continue in business, it being hoped that by doing so he would be able to pay them in full. The creditors accepted notes for the amount of their claims. In November of the following year, the defendant sold Barlow waste from its mills by what are called cash transactions, that is, upon the understanding that it was to be paid for the goods in ten days, and it was paid for the same at the end of ten days in November, while Barlow still was going on. The last of these transactions was after notice that Barlow would not be able to pay his debts at the end of the extension. In December, 1894, Barlow went into insolvency. The payments just mentioned constitute the alleged preference.

The claim which the defendant was allowed to prove was for the old extended debt alone.

It is unnecessary to consider whether as against later creditors, if not as against those who agreed to give time, the credit given upon what merchants call a cash sale stands differently from any longer or other credit in respect of the right of the creditor to accept payment without accepting a preference. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446. For we are of opinion that the debt on account of which the preference, if any, was given, was distinct from the claim upon the note which was proved. The prohibition of § 33 is only that the person who has accepted the preference, etc., "shall not prove the debt or claim on account of which the preference was made or given." This language plainly implies that there may be another debt or claim, as of course there may be, and that the prohibition does not extend to such other debt or claim. We see nothing in the creditor's oath to change the construction, and the meaning of the words cannot be shaken by putting cases where the difference between one claim and two becomes nice. Any distinction, no matter how sensible and how plain, leads at last to a line which is worked out by the contact of decisions clustering around the opposite poles, and which may seem arbitrary if we attend to it alone and not to the nature of the groups which it divides. As no preference was given on account of the note, the section does not apply. Similar words in the last bankrupt act before the present were construed as we construe the Massachusetts statute. *In re Lee*, 14 Bankr. Reg. 89, 92. *In re Holland*, 8 Bankr. Reg. 190. *In re Richter's estate*, 4 Bankr. Reg. 221, 232.

Bill dismissed.

JANE GALLAGHER vs. HATHAWAY MANUFACTURING
CORPORATION.

Bristol. October 25, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Master and Servant — Agreement — Fine — Statute — Action — Pleading.

An agreement, by the terms of which a weaver in a cotton mill is to be paid a certain sum for weaving a described cut of cloth of the first quality and half the amount for a cut of the second quality, the quality to be determined by the superintendent of the mill, is to be taken to refer only to a difference of quality for which the weaver is responsible, and is sufficiently certain to satisfy St. 1894, c. 508, § 55.

An agreement is express none the less that it is expressed by conduct, and not by words.

The deduction by a manufacturing corporation, under an agreement between it and a weaver in its employ, as a fine under St. 1894, c. 508, from his weekly wages of a sum for imperfection in his work of the previous week for which he was paid the full price as for work of the first quality, is not a violation of § 51, as to the weekly payment of wages by such a corporation to its employees; and if he sues for the amount so deducted, the corporation is entitled to judgment under a general denial, or to recover in set-off.

CONTRACT, to recover a balance due for wages. The defendant answered with a general denial, and also filed a declaration in set-off. After the former decision, reported 169 Mass. 578, the case was tried in the Superior Court, without a jury, before *Blodgett, J.*, who found for the defendant; and the plaintiff appealed to this court, and also alleged exceptions. The facts appear in the opinion.

J. W. Cummings, (*E. Higginson & C. R. Cummings* with him,) for the plaintiff.

O. Prescott, Jr., for the defendant.

HOLMES, J. In this case, since it was before the court upon an agreed statement of facts, 169 Mass. 578, there has been a trial, and the judge has found that the plaintiff contracted to work for the defendant upon the terms of a written notice by which the plaintiff was to be paid a certain sum for weaving a described "cut" of cloth of the first quality and half the amount for a cut of the second quality, the quality to be determined by the defendant's superintendent. The plaintiff wove a cut which

was of the second quality, and which was determined to be so by the superintendent. The difference in the pay was deducted from her next week's wages, and she brings this suit to recover the amount. The judge who tried the case found for the defendant, subject to the facts stated by him, and the plaintiff excepted and appealed.

Both parties intended to produce only work of the first quality, and it is found that the difference of amount in the stipulated payments was a fine. It is found that this difference was commonly known as a fine, and that the plaintiff understood the agreement, although she did not know what defects would constitute second quality work, and therefore we feel bound to assume, against a part of the argument for the plaintiff, that her contract was an agreement upon the amount of the fine within St. 1894, c. 508, § 55, subject only to the question whether the amount was fixed definitely enough to satisfy the act.

It is suggested, but is not much pressed, that the agreement covers cases where the cloth is of second quality because of the poor quality of the yarn, or other cause not an imperfection in the weaver's own work, to which last fines are limited by the section cited. But we think that the agreement must be construed with the law, and taken to refer only to a difference of quality for which the plaintiff was responsible.

The more serious objection is that the standard of first and second quality might not be constant, that it is determined by the market, and that the result is the same to the weaver whether the fine is left in terms to vary, or is kept nominally the same but is imposed by a measure which varies from time to time. It is a well known device of dealers who do not want to say they change the price of a liquid to change the size of the receptacle, while keeping the old name of quart, pint, or glass. But it is not argued that the superintendent may determine the quality arbitrarily. Both sides agree that his determination must be reasonable. The plaintiff puts this part of her case on the oscillations of the market, and the changes in grading which may be necessary in order to get customers. Taking the argument as thus limited, we cannot say that the agreement is not reasonably certain. The very section relied on seems to contemplate a fine as determined by "the system of grading their work . . . used

by manufacturers." No mode of determination can give a changeless result. All things change, the dollar as well as others. If we accept the principle of the plaintiff's argument, it still is a question of degree whether the certainty is sufficient. We should suppose, and, so far as anything goes which is disclosed, we must assume, on the finding for the defendant, that the difference between the first and second quality of a given kind of cloth in a given market would be a tolerably permanent as well as certain criterion. Whether the plaintiff knew in what the difference consisted is immaterial, so long as the superintendent in judging was bound to refer to external standards, and could not decide by his own whim. It is not argued that the fine must be agreed on separately in each particular case. The language of the statute implies, in accordance with good sense, that the agreement should precede the imposition of the fine. If so, it naturally would be a general agreement in advance.

At the end of the week when the work in question was done, the plaintiff received full pay as for first class work, and the sum in question was deducted from the next week's wages. This was due to the impossibility of the superintendent's personally examining all the work during the week, and was in accordance with previous practice between the plaintiff and the defendant. The court found that the plaintiff, by implication, agreed that the first payment was provisional, and that such overpayment as this might be withheld the next week. It is urged that if the plaintiff could make such an agreement, at least it should have been expressed. The agreement found by the court is express none the less that it was expressed by conduct and not by words. It was not implied in the sense that it was a legal fiction, such as often has been set up in order to bring a cause of action within the sphere of assumpsit or debt. Apart from statute it does not matter what mode of expression is used, and there is no statute about it.

It is argued also that such an agreement, however made, is contrary to St. 1894, c. 508, § 51, requiring manufacturing corporations and some others to "pay weekly each employee engaged in its business the wages earned by such employee to within six days of the date of such payment." We do not perceive how. The plaintiff has been paid all that is due to her.

She was overpaid one week, and was bound to repay the amount. We see nothing to prevent her agreeing that such an overpayment should go into a mutual account for the next week and reduce the sum due. It surely would not encounter either the words or spirit of the law if an employer should lend his workmen money to be set against his next week's wages. If the fine was lawful, as we have decided that it was, the payment of it might be arranged for in the same way.

As the fine went into a mutual account, ordinarily the claim could be proved under a general denial, as the plaintiff's real cause of action, if any, was only for the balance. The difference between a mutual account and a statutory set-off has been pointed out heretofore. *Goldthwait v. Day*, 149 Mass. 185, 187. *Dewing v. Dewing*, 165 Mass. 230, 231. The only objection which can be urged to the application of this principle to the present case is that at the time of the deduction the superintendent in person had not passed upon the plaintiff's work. It might be urged by an extreme technicality that, although in fact there had been an overpayment which the plaintiff would be bound to refund, and which she had agreed to have charged against her wages, yet the moment for bringing it into the account did not arise until the superintendent had given his judgment. This would be a very technical and strict application of the law in a case like this, where the examination by the superintendent was delayed only because, when his agent pointed out the defects to the plaintiff, she said nothing, and made no complaint until the amount of the fine was withheld. But it is unnecessary to pass upon the point, since it is enough to say that, if the judge was not warranted in finding for the defendant irrespective of the declaration in set-off, then the defendant was entitled to recover in set-off, and one way or the other is entitled to judgment.

Exceptions overruled, and appeal dismissed.

GEORGIANA DOREY, administratrix, vs. METROPOLITAN
LIFE INSURANCE COMPANY.

Bristol. October 26, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Life Insurance — Law and Fact — Instructions — Exceptions.

If the only issue at the trial of an action upon a policy of life insurance is whether or not the assured was in sound health at the date of the policy, and the evidence for each party, if believed, would warrant a verdict for such party, a pure question of fact, and not of law, is raised, and a request for a ruling that, upon the whole evidence, the plaintiff is not entitled to recover, is rightly refused.

No exception lies to the refusal to give an instruction in the language requested, if it is given in substance.

CONTRACT, by the administratrix of the estate of Orissime Dorey, upon a policy of insurance issued by the defendant on the life of the intestate. Trial in the Superior Court, before *Fessenden, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff's intestate died at Fall River on February 8, 1897. By the terms of the policy, which was dated May 13, 1895, the defendant promised to pay to any one of certain persons therein named, upon certain conditions, the sum of \$500, provided that the insured was at the date of the policy alive and in sound health. The defendant contended that, at the date of the delivery of the policy, the insured had the disease cystitis, and was not in sound health, and the case was tried upon the issue whether or not he was then in sound health.

The plaintiff, who was the widow of the insured, testified that she lived with her husband at Newburyport; that at the date of the policy he was in good health; that he worked every day in the winter time at chopping wood, and in the summer on a stone crusher; that in the early part of May, 1895, he was working at cutting wood, and in the latter part of that month he worked at a stone crusher; that up to the time he was insured he had never been kept at home by any sickness; that in the summer of 1895 he was sick five weeks, and Dr. Day attended

him at the house, beginning the last of June or first of July; that they moved to Fall River in October, 1895; that her husband was sick, saying that he had strained himself in the lower part of his body in raising a very large stone at his work; that all through June of that year he worked at the stone crusher; that when he was sick he had trouble passing his water; that before June, 1895, he never complained to her of any trouble with his water, and she had never known of his having any such trouble; and that she could not remember any person for whom he had worked after coming to Fall River.

Mary Bray, a daughter of the intestate, testified for the plaintiff that in May, 1895, she lived in the next half of the house occupied by her father and mother, and she saw her father every day, and his health was good; that he appeared very well and always worked; that his health at the time of his insurance was good; that the winter before he chopped wood, and in May he worked at the stone crusher; that she first heard him complain, after he was insured, about the last of June, 1895; that after that he did no work except the housework; and that the injury at the stone crusher was in the last part of June.

Fred Dorey, a son, and Charles H. Bray, a son in law of the intestate, testified to the same effect.

Mrs. Selina Carrier testified that she lived near the intestate in Newburyport, and used to call at his house and see him about every day; that in 1895 his health was good; that he worked at chopping wood, and doing all kinds of work, also at a stone crusher; and that she had known him eight years.

Joseph Dorey, a son of the intestate, testified that at the time of his insurance his father's health was good; that when he worked at the stone crusher that summer, the witness carried his dinner to him, and saw him lift large stones; that he took his dinner the day his father was injured; that then his father complained of pain, but before that he had never complained of illness or pain; that this was after May 13, 1895; that his father's work at the stone crusher was very hard; and that, after his father left on account of the accident, two men were employed to take his place.

Dr. Edward P. Hurd, called as a witness by the defendant, testified that he had been a practising physician since 1865;

that he knew Orissime Dorey and had attended him professionally; that he remembered distinctly attending him early in July, 1895, and thought he had attended him prior to that; that according to the best of his recollection there was trouble with Dorey in 1894; that his memory was deficient in regard to the matter; that he had an impression that he gave Dorey a gum catheter, but could not say whether it was in 1894 or 1895, because he had no dates; that his memorandum said he made a visit on March 16, 1895; that he distinctly remembered that Dorey was very sick with cystitis on July 3, 4, and 5, 1895; that his memorandum did not refresh his memory in regard to 1894, except the impression that he had been consulted for a specific trouble, and had prescribed for it; that he thought the trouble was the same for which he saw him in 1895, which was a stricture of the urethra and prostatitis; that he never attended Dorey for anything but urinary trouble; that on July 3, 4, and 5, 1895, he had a great stricture and was suffering a great deal; that "we regard it as chronic, that means some duration, not acute trouble that would come on recently"; that this trouble comes on insidiously, with very slight symptoms at first, which gradually increase; that a man who has cystitis is not in sound health; and that, in the witness's opinion, it was not curable in a man of Dorey's age.

On cross-examination the witness testified that cystitis comes on quite gradually, and when it is well developed a man cannot work; that a man might have the first stages of it and do a good deal of hard work; and that "it is not incompatible with the amount of work a man in sound health might do, that is, for a time, until it is developed beyond a certain stage," but the "man is always suffering."

Dr. Clarence C. Day, called as a witness by the defendant, testified that he was a practising physician and had known and attended Orissime Dorey; that his first attendance was in February, 1894, at his office; that he was not positive what it was for, but thought for some urinal disturbance; that his next attendance was at his office on May 18 and 21, 1895, when Dorey complained of considerable trouble with his water; that the witness at that time formed an opinion of what the trouble was; that in his opinion Dorey was suffering from some obstruction

to the flow of water, either stricture or enlarged prostate with cystitis; which had followed the obstruction of the urethral passage; that he could not say positively just how long the trouble had existed, but in his opinion it was then of several months' standing; that Dorey then told the witness about having previously used a catheter and been obliged to take it into the woods with him that winter; that Dorey then stated that he had been using this catheter several months or more; that the witness attended Dorey at the latter's house on June 22, 23, and 24, 1895; that he could only say in a general way what was the matter with him; he did not remember attending him for anything except this water trouble; that he saw him nearly every day from July 1 to 21, 1895, but never for anything except water trouble; that a considerable part of the time Dorey was undressed and in bed; that from what he learned of the case it seemed to him that his condition had originated in a stricture with possibly an enlargement of the prostate, either or both of which might produce inability to pass water; that as a consequence of this inability Dorey had resorted to the use of a catheter, the introduction of which into the bladder, except under the most absolute surgical cleanliness, is liable to induce a purulent inflammation; that the use of a catheter in the woods without particular regard for cleanliness would be apt to produce such a condition as the witness found; and that he did not believe that the act of lifting of itself could produce that trouble.

Upon cross-examination, the witness further testified that, in his best judgment, a great strain produced by trying to lift too heavy a burden for a man's strength would have no effect upon the disease which he had mentioned; that he was certain he saw Dorey in February, 1894; that he next saw him on May 18 and 21, 1895, and found him suffering from some urinal disturbance; that in July, 1895, Dorey had severe cystitis; that it would be very difficult to say whether a man could work with this disease in its aggravated form; that it would depend on the grade of severity and the man's ability to do work under adverse circumstances; that on May 18, 1895, his condition was not so bad as when the witness saw him in July; that he had cystitis in May; that his symptoms, though not so severe as in July,

were still sufficient to leave no doubt that he had it in May, 1895; that in May, if he had considerable fortitude, he might have stood up and done his work; that he did not think he could have stood up until the latter part of June and done a very hard day's work; that such diseases as Dorey had in May, 1895, are incurable, so far as the obstruction to the water passage goes at least; that whether it could be so far relieved as to obviate a fatal result would be hard to say in a given case; and that this disease is not necessarily fatal at once.

On redirect examination, the witness testified that in his opinion Dorey was not in sound health on May 13, 1895.

Dr. A. W. Buck, called as a witness by the defendant, testified that he was the city physician of Fall River and knew Dorey; that Dorey died from poisoned uremia due to cystitis; that he was also afflicted with stricture of the membranous portion of the urethra; that on February 1, 1897, when the witness first saw Dorey, he was in a condition resulting from advanced cystitis; that his general powers were very much reduced and his arterics hardened; that this trouble was of long standing; that cystitis would not be caused by lifting a stone; that cystitis in its chronic form is a serious disease; that a man of Dorey's age having an enlarged prostate or stricture and cystitis therefrom, in his opinion, would in his condition be incurable; and that, in the opinion of the witness, it would be impossible for a man who on May 18 had cystitis caused by an obstruction in the urinal passage, either due to an enlarged prostate or stricture, to have been in sound health on May 13, five days before, because the enlargement of the prostate is a gradual process.

The defendant requested the judge to rule as follows:

"1. On the whole evidence, the plaintiff is not entitled to recover. 2. If Orissime Dorey, the insured, had cystitis on May 13, 1895, the date on which the policy was issued, then the plaintiff is not entitled to recover."

The judge refused to give the first request, and instructed the jury with reference to the second request in part as follows:

"The defendant says that the deceased was afflicted with a grave, serious, and important ailment, cystitis; that it was not a mere temporary matter, but it was something which was permanent in its nature, and which did in effect result in his death. The

defendant says that there is no controversy or question in the case that he died of this inflammation of the bladder, cystitis, and that this was brought about not in a day, not in a week, nor in a month or in a year, but that it existed on May 13, 1895, and before that time. It is not necessary that it should appear that the deceased knew it. If he had it and did not know it, there can be no recovery in this case." The defendant excepted to the refusal to give the rulings as requested.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. J. Jennings & J. M. Morton, Jr., for the defendant.

E. Higginson, (C. R. Cummings with him,) for the plaintiff.

HAMMOND, J. This is an action by the administratrix of the estate of Orissime Dorey on an insurance policy on the life of said Dorey, dated May 13, 1895. By the terms of the policy no obligation was assumed by the defendant unless the insured was, at its date, in sound health. At the trial before a jury the only issue was whether or not Dorey was in sound health at that time. Upon this question evidence was introduced on each side. Without reciting it here in detail, it is sufficient to say that the evidence introduced by the plaintiff would, if believed, warrant a verdict for the plaintiff, and that introduced by the defendant would, if believed, warrant a verdict for the defendant. A pure question of fact, and not of law, was raised. The first request was rightly refused.

Although the second request was not given in its exact terms, it was substantially given, and in clear language.

Exceptions overruled.

ALVIN H. WHITING vs. EDWARD R. PRICE & another.

Bristol. October 26, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

False Representations — Law and Fact — Damages — Instructions — Offer to return Property.

A false representation that a bond of a corporation is secured by a mortgage of real estate of the value of half a million dollars may be recovered for, although the bond itself states that it is "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)."

In an action for false representations in the sale of a bond, whether the plaintiff was warranted in relying on the representations may be a question for the jury, notwithstanding the fact that the defendant referred to the sources of his information and advised the plaintiff to consult them.

At the trial of an action for false representations in the sale of a bond, the measure of damages is the difference between the actual value of the bond at the time of the purchase and its value if it had been what it was represented to be, secured as represented; and subsequent events may be taken into account in arriving at the value at the time of the purchase, and may show that the market value was illusory.

The plaintiff, in an action for false representations in the sale of a bond, need not offer to return the bond to the defendant.

TORT, against Edward R. Price and Arthur T. Parker, for false representations in the sale of a bond of the Jacksonville Electric Light Company. After the former decision, reported 169 Mass. 576, the case was tried in the Superior Court, before *Richardson, J.*

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

H. J. Fuller, (*W. H. Pond* with him,) for the defendants.

G. A. Perkins, for the plaintiff, submitted the case on a brief.

HOLMES, J. This is an action for false representations, which has been before the court already upon a demurrer to the declaration. 169 Mass. 576. It now comes up upon exceptions taken at the trial.

The bond respecting which the representations were made stated that payment was "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)." The representation proved was that the

bond was secured by a mortgage of real estate of the value of half a million dollars. In fact, the company owned no real estate, and the bond was not secured by a mortgage of real estate. An exception was taken to a ruling allowing the plaintiff, even if he had read the bond, to recover for this further statement about the security. We see no reason for the exception, and none is offered for it. The alleged representations did not contradict the bond, they made specific and definite what the bond left vague.

The defendant Parker stated to the plaintiff at North Attleborough what he alleged he had been told by several persons, named, living in the town and known to the plaintiff. The defendant advised the plaintiff to see and consult with them. The defendant asked a ruling to the effect that the plaintiff could not recover for such statements when he was referred to the sources of the defendant's alleged information. This was refused, the judge intimating that it depended on the circumstances, and seemingly leaving it to the jury whether the plaintiff ought to have inquired of the persons named. So far as appears, this was the proper course. It is true that in cases of representations as to quality, correspondence to sample, etc., of goods exhibited in the buyer's presence, the court has ruled that if the buyer had full means of ascertaining the truth for himself, he could not set up that he was imposed upon by fraud; *Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265; *Slaughter v. Gerson*, 13 Wall. 379; *Long v. Warren*, 68 N. Y. 426; and that a verdict has been directed partly on that ground. *Poland v. Brownell*, 131 Mass. 138. See *Bayly v. Merrel*, Cro. Jac. 386. But the requirement as it has been worked out does not call for more than reasonable diligence; *Holst v. Stewart*, 161 Mass. 516, 522; *Brown v. Leach*, 107 Mass. 364, 368; *Nowlan v. Cain*, 3 Allen, 261, 264; and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury. *Holst v. Stewart*, 161 Mass. 516, 522, 523. See *Burns v. Lane*, 138 Mass. 350, 355, 356; *Whiteside v. Brawley*, 152 Mass. 138. The matter may have been confused a little by not distinguishing between seller's talk as to value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts con-

cerning which even sellers may be held liable for fraud, and as to which the buyer may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases.

The judge, at the defendant's request, instructed the jury that the measure of damages was the difference between the actual value of the bond at the time of the purchase and its value if it had been what it was represented to be, secured as represented. *Morse v. Hutchins*, 102 Mass. 439, 440. *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 587. He then instructed them further that they "would inquire what the value of the bond was at that time in view of the circumstances which have transpired," and what it would have been if it had been secured as according to the plaintiff's evidence the defendant said it was, adding, "You will take into account what has happened since in order to determine what the value of the bond was and what it is now." The defendants excepted to the further instruction. With some hesitation, we have come to the conclusion that this exception should be overruled with the rest. The reference to the present value of the bond, in the last words quoted, cannot be taken to have overruled the express direction as to how the damages were to be measured. We think that what was added to that express direction merely amounted to allowing the jury to take subsequent events into account in arriving at the two values at the time of the purchase, which the jury were directed to compare. We cannot say that this was wrong. The market value of the bond at the time of the sale may have been illusory, because the public also may have been deceived. The statement which we have quoted, appearing in the bond of an electric light company, certainly conveys the impression that it has a plant and property which naturally would include land. Or if it be answered that the public, which makes market prices generally, looks a little further than such vague words, the question remains what would have been the value of a bond adequately secured, when the public were willing to pay par for one depending so far upon speculation for its value that subsequent events have shown it to be worthless. The subsequent events may be likened to the coming out of a

latent disease existing in a horse at the time of a fraudulent sale, to take an example put by Cockburn, C. J., in *Twycross v. Grant*, 2 C. P. D. 469, 544. It was intimated that subsequent events might be considered in *Coffing v. Dodge*, 167 Mass. 231, 241, and it was decided that they might be, in order to determine the worth of stock, in *Peek v. Derry*, 37 Ch. D. 541, 591 *et seq.*, a decision not affected by the subsequent reversal by the House of Lords, on the ground that fraud was not made out. *Derry v. Peek*, 14 App. Cas. 337. See also *Hubbell v. Meigs*, 50 N. Y. 480, 492; Sedgwick, Damages, (8th ed.) § 257. We may follow these cases without regard to the possible conflict between the measure of damages in this State, and that adopted elsewhere. It would seem probable that in the present case the jury found the bond to have been worthless, and gave the plaintiff no more than he paid, but with that we have nothing to do.

The plaintiff did not offer to return the bond to the defendants. He was not bound to do so. The action is for false representations and proceeds upon an affirmation of the purchase. *White-side v. Brawley*, 152 Mass. 133, 134. The dictum in the case of *Hedden v. Griffin*, 136 Mass. 229, cited for the defendant, has no bearing. There the plaintiff was induced by the defendant's false representations to take a contract of insurance from a third person. The insurance company was solvent, and the policy was a good policy. The representations went to collateral matters. The plaintiff had a right to rescind, however, which he exercised. It was intimated in the course of the decision that, if he had chosen to keep the contract, his damages would have been only nominal, which very likely was true, as the plaintiff got what he expected. Here the ground of complaint is that the plaintiff did not get what he expected.

Exceptions overruled.

CATHERINE RILEY vs. MICHAEL LALLY.

Middlesex. November 9, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Eviction — Landlord and Tenant — Trial — Exceptions.

It is within the discretion of the judge presiding at a trial, when the plaintiff has rested, to entertain a motion by the defendant to direct the jury to return a verdict for him.

At the trial of an action by the assignee of a lease for an eviction from the leased premises, consisting of a store and the cellar under it, it appeared that the store was closed by somebody for several days after the assignment of the lease, to which the defendant had assented; and that the door to the cellar from the bulkhead on the outside of the premises was fastened at or about the same time by a bar on the inside, and remained fastened for a longer period of time. There was no evidence that the defendant closed the store as distinguished from the cellar; but the evidence was that he refused to open the cellar door at the foot of the bulkhead, and said that he would not open it until he got a sum named. A witness testified that, when the assignor was moving out, the defendant told the former that the cellar door was open if the assignor wanted to use it; and also testified that the bulkhead was open, but the door at the foot of the stairs was closed and fastened. The assignor testified that he never received any key to this door from the defendant, or anybody representing him, "and it was always open before the date they say it was closed." Neither the assignor nor the plaintiff saw the defendant close the door or fasten it, and did not know who did fasten it. *Held*, that it did not appear that the direction of a verdict for the defendant was wrong.

TORT, for an eviction from leased premises in Lowell. Trial in the Superior Court, before *Sherman, J.*, who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. F. Manning, for the plaintiff.

D. J. Murphy, for the defendant.

FIELD, C. J. These exceptions are almost unintelligible. They recite that the pleadings may be referred to. The defendant, it seems from the pleadings, let a certain store and the cellar under it to one John Lamb, by an indenture of lease for the term of three years from June 1, 1894. The lease provided that the lessee should not "permit any other person or persons to occupy or improve the same [the premises], or make or suffer to be made any alteration therein, but

with the approbation of the lessor thereto, in writing, having been first obtained." It is alleged that John Lamb by an indenture assigned this lease to the plaintiff, which assignment was assented to in writing by the defendant. The exceptions recite that this lease and assignment, with the written assent of the defendant thereto, were put in evidence. The plaintiff also introduced certain oral evidence, and when she rested, on motion of the defendant's counsel, the court directed the jury to return a verdict for the defendant. The court in its discretion could at this stage of the case entertain such a motion.

The declaration alleged that on August 6, 1894, the plaintiff "took lawful possession of the premises named in said lease and assignment by virtue thereof; and held peaceable and quiet possession of said premises until on or about September seventh, A. D. 1894, when she was unlawfully and without right evicted from all parts of said premises, for the space of about three days, by the said defendant, or by his authority, connivance, and consent; and further, the plaintiff says, that from on or about the said seventh day of September, A. D. 1894, the said defendant ousted and evicted her, unlawfully and without right, from the cellar named in said lease and assignment, and illegally deprived her of the peaceable and quiet enjoyment of said cellar (and broke his implied covenant for the same) for a long space of time thereafter; to her great damage and injury. And the plaintiff further says, that, in consequence of said illegal eviction and deprivation by the said defendant, she was forced and compelled to abandon her tenancy under said lease; and that she did abandon the same, in consequence of the said illegal acts of the defendant, to her great damage and injury."

It seems that the store above the cellar was closed by somebody from Wednesday to Saturday, after the assignment of the lease, and that the door to the cellar from the bulkhead on the outside of the premises was fastened at or about the same time by a bar on the inside, and remained fastened for a longer period of time. It is assumed in the brief of the plaintiff's counsel that the plaintiff could not get into the cellar from the store except by going outside and down this bulkhead through this door, but the exceptions do not distinctly show this. There is no evidence that the defendant closed the store as distinguished from

the cellar. The evidence is that he refused to open the cellar door at the foot of the bulkhead; that he said he would not open it until he got three hundred dollars. The conclusion of the exceptions is as follows: "Q. [To John A. Carroll.] (By Mr. Manning.) Did you hear Mr. Michael Lally say anything about it? A. The last Saturday we were moving out he come to me and told me that his cellar door was open if Mr. Lamb wanted to use it. I told him I had nothing to do about it. The bulkhead was open, but the door at the foot of the stairs was closed and fastened. Mr. Lamb testified that he never received any key to this door from Mr. Lally, or anybody representing him, and it was always open before the date they say it was closed. Neither Mr. Lamb nor Mrs. Riley saw Mr. Lally close the door or fasten it, and don't know who did fasten it. No issue is raised as to the inside cellar door, or the entrance to the store from the street up stairs."

No evidence is recited that the plaintiff abandoned the possession by reason of the cellar door being barred, unless that is to be inferred from the testimony of Carroll above stated, and we think that this testimony is not sufficient to support such an inference. We are of opinion that, on the evidence recited in the exceptions, it does not appear that the ruling of the court was wrong. There is not sufficient evidence recited to show an expulsion of the tenant by the landlord from a part of the premises, done with the intention of depriving the tenant of the enjoyment of such part, to which the tenant yielded, and in consequence of which she abandoned possession of the premises. See *Bartlett v. Farrington*, 120 Mass. 284.

Exceptions overruled.

MILES F. BRENNAN & another vs. ALEXANDER MCINNIS
& trustee.

SAME vs. SAME.

Suffolk. November 10, 1898. — November 23, 1898.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Trustee Process — Premature Appeal.

If, where a trustee appeals from orders of the Superior Court overruling his motion that he be discharged on his answer and requiring him to answer certain interrogatories propounded by the plaintiff, it does not appear that the action against the principal defendant has been tried, the appeal is prematurely entered, and must be dismissed.

FIELD, C. J. These actions were begun by trustee process. The trustee in each case has appealed from an order of the Superior Court overruling his motion that he be discharged on his answer, and also from an order of said court requiring him to answer certain interrogatories propounded by the plaintiff. It does not appear that the actions against the principal defendant have been tried, and it is of course uncertain whether the trustee ultimately will be charged or discharged. The plaintiffs may fail to maintain their actions against the principal defendant, or, if they obtain a verdict against the principal defendant, the trustee may be discharged. These appeals therefore have been prematurely entered, and must be dismissed. *Elliot v. Elliot*, 133 Mass. 555. *Lowd v. Brigham*, 154 Mass. 107.

In *Nutter v. Framingham & Lowell Railroad*, 131 Mass. 231, it appears from the report that the trustee, a corporation, had been defaulted and adjudged a trustee before its exceptions were entered and heard in this court. It also appears, from an examination of the original papers in said cause, that the principal defendant had been defaulted, and that damages had been assessed against him, and that the trustee, in addition to its exceptions to the order of the court requiring it to answer certain interrogatories which it declined to do, appealed from the judgment of the court ordering it to be defaulted and adjudged a trustee.

Appeals dismissed.

P. W. Carver, for the trustee.

N. D. Pratt, for the plaintiffs, submitted the case on a brief.

COMMONWEALTH vs. EDWARD F. O'BRIEN.

Bristol. October 24, 1898. — November 28, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Obtaining Money by False Pretences — Indictment — Defence — Evidence —
Common Law and Statute — Criminal Intent — Instructions.*

An indictment, under Pub. Sta. c. 203, § 59, alleged that the defendant, at a time and place in this Commonwealth named, with intent to cheat and defraud A., falsely pretended that certain property situated at N. in another State was "then and there" solely owned by the defendant, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to organize a corporation and become an owner of stock in it by turning over the property to the proposed corporation in exchange for stock; that the defendant "then and there" executed and delivered to A. an instrument, which was set out, and which promised to convey twenty shares of the corporation to A. in consideration of \$2,000; and that A. "then and there," believing the representations, was induced thereby to deliver and did deliver a check for \$2,000 to the defendant upon the execution and delivery of such instrument; and negatived most, but not all, of the alleged pretences. *Held*, that it was sufficiently alleged that the delivery of the instrument was made the condition of the payment, and that the condition was performed and accepted as performed by A.; that the words "then and there" in each instance referred to the time and place of the representations, and not to N.; and that it was not necessary to allege that the instrument was falsely made, and enough of the alleged pretences were negatived to show that the scheme was fraudulent.

It is no defence to an indictment for obtaining money by false pretences, that an agreement, upon the execution and delivery of which by the defendant the money was paid, was illegal.

At the trial of an indictment for obtaining money from A. by false pretences, evidence of A. that the alleged representations satisfied him and induced him to give the defendant the money, and that he would not have parted with the money but for them, is admissible.

At the trial of an indictment for obtaining money by false pretences that certain property was owned by the defendant solely, and that he intended to organize a corporation and become a large owner of stock in it by turning over the property to the proposed corporation in exchange for stock, no exception lies to the refusal to rule that there was no evidence that the defendant did falsely pretend that he proposed and intended to become a large owner of stock in the corporation by turning over the property in exchange for it; the statements testified to being that the defendant stated that he intended to form a corporation and would deliver stock to the witness, who was the defrauded person.

If representations of the defendant, in an indictment for obtaining money by false pretences, that he owned certain property solely, that there was no encumbrance upon it, and that he did not owe a dollar to any one, were false, he is not entitled to a ruling that the jury should acquit him, unless they should find the further representations that he intended to form a corporation and exchange the prop-

erty for stock to have been false, as charged; and, if the evidence shows that A.'s money was obtained by a fraudulent scheme, the jury are warranted in finding that the pretences were false throughout.

At the trial of an indictment for obtaining money by false pretences that certain looms and machinery were owned by the defendant solely, and that "upon said looms and machinery there was no encumbrance," the defendant requested the ruling that there was no evidence that the property was encumbered on the date when the representations were made. The judge instructed the jury that there was no such evidence, and that the government's position was not that the defendant owned the property and that it was encumbered, but that he did not own it at all and never had owned it. *Held*, that the defendant had no ground of exception.

If a person is indicted, under Pub. Sts. c. 203, § 59, for obtaining money by false pretences, it is immaterial that by the common law of this Commonwealth the offence charged is not a crime, or what the common law of another State is, where the first conversation between the parties took place.

It is immaterial whether the intent of a person charged with obtaining money by false pretences was consciously directed to law breaking.

If it is proved that the defendant in an indictment for obtaining money by false pretences that certain property was owned by him solely, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to form a corporation and exchange the property for stock, pretended to own the property and did not, he is not entitled to ask that a verdict be directed for him.

At the trial of an indictment for obtaining money from A. by false pretences that certain property was owned by the defendant solely, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to form a corporation and exchange the property for stock, the defendant asked a ruling that the jury might find the false pretences as to the defendant's ownership and freedom from debt immaterial. The judge instructed the jury that these were the representations upon which the government relied; and that, if the inducement to A. was complete in another State, where the first conversation took place, and the representations made here were not the inducement and operative cause to A. to part with his money, then the defendant should be acquitted, although he repeated the false representations to A. here before the money was delivered. *Held*, that this was sufficiently favorable to the defendant.

INDICTMENT, under Pub. Sts. c. 203, § 59, alleging that the defendant, "of Newport in the State of Rhode Island," on October 31, 1894, at Taunton, "with intent to cheat and defraud one Lawrence A. Kearns, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said Kearns that certain property, to wit, certain looms and machinery situated in said Newport which he," the defendant, then and there had in his possession, and with which he was then at said Newport manufacturing webbing and elastic goods, were "then and there the property of him," the defendant, "and were then and there solely owned by him," the defendant; "that upon

said looms and machinery there was no encumbrance"; that the defendant "did not then owe a dollar to any one"; that the defendant "did then and there propose and intend to organize with others, on or before the first day of December, A. D. 1894, a certain corporation, to wit, the Newport Web Company, and become a large owner of stock of said company by turning over, selling, and delivering said property in payment and exchange therefor to said company"; that the defendant "did then and there execute and deliver to the said Kearns a written instrument of the tenor following, that is to say: — Know all men by these presents that I, Edward F. O'Brien, of the city and county of Newport in the State of Rhode Island, etc., in consideration of two thousand \$2,000 dollars and other good and valuable considerations to me paid by Lawrence A. Kearns, of the city of Taunton in the Commonwealth of Massachusetts, do hereby agree that on the incorporation of the Newport Web Company, a corporation which is proposed and intended to be organized by me with others on or before December 1 next hereafter, I will convey unto him, the said Kearns, twenty shares of the preferred capital stock of said corporation of the par value of one hundred dollars, each carrying seven per cent interest; and I agree to vote with the said Kearns at the first meeting of the members of said corporation to employ him as the agent thereof in the city of Boston in said Massachusetts, for the purpose of making sales of the product of said Newport Web Company, and generally in connection with the business thereof in said Boston, at a salary of nine hundred dollars per year, payable monthly, with an additional remuneration of five per centum of the net returns of all sales made by him."

The indictment further alleged that Kearns, "then and there believing the false pretences and representations so made" by the defendant, "and being deceived thereby, was induced by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver" to the defendant "upon the execution and delivery to him, said Kearns," by the defendant "of the written agreement aforesaid, a check and order for the payment of money of the amount and of the value of two thousand dollars" of the goods, moneys, and effects of Kearns; and that the defendant then and there received and

obtained the moneys and effects of Kearns by means of the false pretences and representations, and with intent to cheat and defraud the said Kearns of the same moneys. "Whereas in truth and in fact the said looms and machinery in the possession of and used by the" defendant "at said Newport, in manufacturing webbing and elastic goods as aforesaid, were not then and there the property of" the defendant, "and were not then and there solely owned by" him, "and said looms and machinery were not then and there free from encumbrance," and the defendant "did then owe large sums of money to divers persons," and he "did not then propose and intend to organize as a corporation the Newport Web Company" on or before December 1, 1894, "and convey to said Kearns twenty shares of the preferred capital stock of said corporation," and that the defendant did not then propose and intend to vote with said Kearns to employ him as agent as alleged, with the salary and remuneration alleged, all of which he then and there well knew.

In the Superior Court, before *Bishop, J.*, there were motions to quash and strike out parts of the indictment which were overruled; and the jury returned a verdict of guilty. The defendant alleged exceptions, which appear in the opinion.

J. W. Cummings, (*C. R. Cummings* with him,) for the defendant.

A. J. Jennings, District Attorney, (*M. R. Hitch*, Assistant District Attorney with him,) for the Commonwealth.

HOLMES, J. This is an indictment for obtaining money by false pretences. The trial of the case was obscured by an excessive number of objections and requests for rulings. We shall confine ourselves to disposing of the points insisted on in the argument. *Commonwealth v. Devlin*, 141 Mass. 423, 432.

1. The motion to quash, and the accompanying motion to strike out certain passages from the indictment, which, for the sake of the argument, we treat as offering further reasons for the motion to quash, were properly overruled. The indictment alleges false pretences that certain property was owned by the defendant solely, that there was no encumbrance upon it, that the defendant did not owe a dollar to any one, and that he intended to organize a corporation and become an owner of stock

in it by turning over the property to the proposed company in exchange for stock. It then alleges that the defendant executed and delivered to the defrauded party, one Kearns, an instrument, which is set out and which promises to convey twenty shares of the corporation to Kearns in consideration of two thousand dollars. It then alleges that Kearns was induced by the false pretences to deliver and did deliver a check for two thousand dollars to the defendant upon the execution and delivery of the above mentioned instrument.

The first objection is that it is not alleged whether the two thousand dollars were obtained by sale or how otherwise, and that it does not appear that Kearns accepted the instrument. It is alleged that Kearns was induced to and did hand over the check "upon" the execution and delivery to him of the instrument, and that the instrument was delivered to him. This is a sufficient allegation that the delivery was made the condition of the payment, and that the condition was performed, and accepted as performed by Kearns. In *Commonwealth v. Dunleay*, 153 Mass. 330, in order to complete the fraud it was necessary to show, not only that a forged application for insurance had been delivered to the defrauded insurance company, but that the company had assented to the application and so supposed itself to have a contract. The decision does not mean that an instrument can be delivered without being accepted, but that the proposal in the instrument also should have been shown to have been accepted. Here acceptance of the instrument was all that was needed. As to its not appearing whether the money was obtained by sale or how otherwise, all the elements of fact in the transaction are stated within the requirements of *Commonwealth v. Strain*, 10 Met. 521, 523, and it is unnecessary to give them a legal name. The connection between the representations and the result is sufficiently plain. It is true, to turn to another matter, that the intent alleged is not an intent to make the bargain which was made, or to obtain the specific check or amount which is alleged to have been obtained. But this is not like the case where the purpose of the fraud is to sell or to obtain a specific object, and the representations are made concerning the object and to that end, as in *Commonwealth v. Goddard*, 4 Allen, 312, and *Commonwealth v. Lannan*, 1 Allen, 590.

The defendant's intent at the time of the representations may have been, and presumably was, merely to get what he could in exchange for what he could induce Kearns to take, but that would be enough. See *Commonwealth v. Howe*, 132 Mass. 250. It is alleged that he received and obtained the money by means of the representations with intent to defraud Kearns of the money.

Next it is said that, as the representation was that the property was at Newport in Rhode Island, the allegations following the word Newport, to the effect that the defendant represented that the property was "then and there" owned by the defendant, that he "then and there" delivered the instrument, and that Kearns "then and there," believing, etc., was induced, etc., must be referred to Newport as the nearest antecedent, and so the crime was not completed in this State. But upon reading the whole paragraph it is plain that the "then and there" in each instance refers to the time and place of the representation, which was at Taunton. *Jeffries v. Commonwealth*, 12 Allen, 145, 151, 152. See *Commonwealth v. Call*, 21 Pick. 515, 521. There is no real uncertainty as to the meaning of the words as in *Commonwealth v. Wheeler*, 162 Mass. 429, and *Jeffries v. Commonwealth* is in point.

The next objection is that the agreement set forth contained an illegal undertaking to vote with Kearns to employ Kearns as agent of the company, and that this takes away the criminal character of the fraud, as the money was parted with for an unlawful purpose. *McCord v. People*, 46 N. Y. 470. *State v. Crowley*, 41 Wis. 271, 281, 282. If we assume that the promise was not merely not enforceable, but illegal, as may result from a comparison of *Guernsey v. Cook*, 120 Mass. 501, and *Woodruff v. Wentworth*, 133 Mass. 309, 314, with *Bishop v. Palmer*, 146 Mass. 469, 474, the question remains whether the conclusion follows. As is pointed out by Peckham, J., in his dissent in 46 N. Y. 475, the criminal law has a public end in view, namely to deter people from swindling. With the greatest respect for the New York and Wisconsin courts, we think this end is more effectually reached if we do not read into the absolute words of the statute (Pub. Sts. c. 203, § 59) an implied exception which allows a knave to cheat any one out of his

money if the knave can succeed in persuading his victim into a scheme which has any technical element of illegality on the victim's side. The question of allowing the latter a personal remedy is essentially different. See *Commonwealth v. Smith*, 129 Mass. 104, 111; *Commonwealth v. Morrill*, 8 Cush. 571; *Commonwealth v. Langley*, 169 Mass. 89, 90, 92; *Commonwealth v. Henry*, 22 Penn. St. 253; 2 Bish. Crim. Law, §§ 468, 469.

In support of the second motion above mentioned, it is urged that the instrument is not alleged to have been falsely made, and that some of the alleged pretences are not negatived. There was no need of the former allegation. The instrument made, no doubt, the contract which it affected to make. As to the pretences, they all formed part of one single scheme of getting Kearns to take stock in the corporation supposed to be projected. Enough are negatived clearly and sufficiently to show that the scheme was fraudulent. *Commonwealth v. Morrill*, 8 Cush. 571. *Commonwealth v. Parmenter*, 121 Mass. 354. *Commonwealth v. Stevenson*, 127 Mass. 446.

2. Exception was taken to the admission of Kearns's testimony that the representations alleged satisfied him and induced him to give the defendant the check, and that he would not have parted with the check but for them. The testimony went directly to one of the issues, and was admissible. The verbal criticisms on the form do not impress us. *Commonwealth v. Drew*, 153 Mass. 588, 592, 595.

3. The charge is excepted to because it told the jury that it was not necessary to discuss the law of cases of crimes begun in one State and finished in another, as if it had told the jury to disregard evidence of what happened in Rhode Island. The instruction was wholly in favor of the defendant, and was coupled with the statement that a conviction here must be had upon pretences made here, and not in Rhode Island.

4. Thirty-seven rulings were asked. Exceptions were saved as to those numbered 3, 4, 5, 6, 7, 9, 10, 11, 14, 19, 23, 24, 25, 28, 29, 30, 31, 33, 35, and 37. The third was to the effect that there was no evidence that the defendant did propose and intend to become a large owner of stock in the company by turning over the property in exchange for it. The indictment does not allege that the defendant proposed and intended but that

he pretended that he proposed and intended. Whether true or false, this pretence was equally consistent with his scheme, and indeed to make it was a necessary part of the scheme. It is true that Kearns did not testify to an express statement of such an intent by the defendant. But the statements which were testified to, that the defendant intended to form a corporation and would deliver stock to the witness, imported it as plainly as if it had been stated in terms.

The fourth request required the jury to acquit, unless they found the last mentioned pretence false. But if it had been true that the defendant intended to form a corporation and exchange this property for stock, as very likely it was, still, if the pretences as to his ownership, his freedom from debt, and the freedom of the property from encumbrance were false, his ability to perform his contract for which Kearns gave his check was impaired to that extent, and the check was obtained by fraud. *Commonwealth v. Lee*, 149 Mass. 179, 184. We may add with reference to the seventh request, — viz. that there was no evidence that the defendant falsely pretended that he proposed to form a corporation, etc., — that, in view of the evidence that Kearns's money was obtained by a fraudulent scheme, the jury were warranted in finding that the pretences were false throughout, as they did find that the most material among them were. Furthermore, the judge instructed the jury that the government did not ask a conviction upon the allegations in the indictment that the defendant [pretended that he] intended to form a corporation, etc. We do not think that the fifth, sixth, and twenty-ninth requests need further remark.

The eleventh and fourteenth rulings asked were that the jury should disregard the allegation "that upon the looms and machinery there was no encumbrance," (we presume the allegation that the defendant made pretences to that effect was meant,) "because it is not properly . . . negatived," etc., and that there was no evidence that the property was encumbered on the date when the representations were made. The judge instructed the jury that there was no such evidence, and that the government's position was not that the defendant owned the property and that it was heavily encumbered, but that he did not own it at all, and never had owned it.

The twenty-fourth ruling asked, that by the common law of Massachusetts the offence charged was not a crime, was immaterial, as there was a statute which made it one. Still more immaterial is the twenty-third, as to the common law of Rhode Island, and we can perceive no bearing of any proper sort which it could have upon the case. This disposes also of the nineteenth request. It is suggested that, if his conduct was lawful under the law of Rhode Island, it has a bearing upon the defendant's criminal intent. It is perfectly immaterial whether his intent was consciously directed to law breaking. His ignorance of the law would have made no difference in his liability. If he knew that his representations were false, and if he intended to deceive by them, and by the help of the motives thus created to get Kearns's property, he had the only criminal intent which the statute requires.

The twenty-fifth request was to direct a verdict for the defendant. This does not need special discussion. It was proved that the defendant pretended to own the property, and did not. It was a natural inference that this pretence led or helped to lead Kearns to part with his money on receiving the contract set out.

The twenty-eighth ruling asked was that the jury might find the false pretences as to the defendant's ownership and freedom from debt immaterial. The judge instructed the jury, as we have said, that these were the representations upon which the government relied. He also instructed them that, if the inducement to Kearns was complete in Rhode Island, where the first conversation took place, and the representations made in Taunton were not the inducement and operative cause to Kearns to part with his money, then the defendant should be acquitted, although he repeated the false representations to Kearns at Taunton before the check was delivered. This was sufficiently favorable to the defendant.

The thirtieth ruling asked turns on the illegality of the agreement, and has been disposed of in dealing with the motion to quash. The thirty-seventh was covered by the instruction just mentioned under the head of the twenty-eighth request.

No other exceptions were argued.

Exceptions overruled.

HARRY L. AINSWORTH vs. MOUNT MORIAH LODGE, ANCIENT,
FREE, AND ACCEPTED MASONS & others.

Hampden. September 27, 1898. — December 9, 1898.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Lease — "Life of the Building."

If a building, a portion of which is leased during the "life of the building," is so injured by fire as substantially to destroy the part demised and to render it impracticable for the lessee to perform the covenant to rebuild such part except by rebuilding other important parts of the building not demised, the "life of the building" may be said to have terminated, within the meaning of the lease.

TORT, against Mount Moriah Lodge, Ancient, Free, and Accepted Masons, described as a corporation, Olin C. Towle, George W. Waterman, and Stephen B. Cook, trustees of the same, for injury caused to the plaintiff's property by the fall of a wall of a building.

At the trial in the Superior Court, before *Maynard, J.*, it appeared that the plaintiff occupied a store in a two-story wooden building in Westfield; that the individual defendants were the successors in office of the lessees in a lease of a portion of a three-story brick building adjacent to that occupied by the plaintiff; that the first named defendant was not a corporation; that on March 11, 1896, the brick building was greatly injured by fire; and that, about two weeks later, the walls of the building were blown down, one of them falling upon the adjoining building and damaging the plaintiff's property therein.

The jury returned a verdict for the first named defendant, by direction of the judge, and for the plaintiff against the other defendants; and they alleged exceptions, which appear in the opinion.

H. W. Ely, (*A. S. Kneil* with him,) for the individual defendants.

W. H. McClintock, (*J. B. Carroll* with him,) for the plaintiff.

HAMMOND, J. In order to hold Towle, Waterman, and Cook, hereinafter called the defendants, it was necessary for the

plaintiff to show that at the time the wall fell the defendants had an interest in the building; and on this point his only claim was that they, as successors of the lessees named in the lease from Horton and others to Lewis and others, were at that time the holders of the leasehold estate thereby created, and that the estate was then outstanding.

One of the answers made by the defendants to this claim was that the leasehold estate was terminated by the ravages of the fire and consequently was not outstanding at the time the wall fell. If the defendants were right in this, they could not be held. Considerable evidence as to the condition of the building after the fire was introduced.

At the close of the evidence, the defendants asked the court to rule that "the life of the building had been terminated prior to the time the wall fell, and that the life of the building had been terminated by fire." The court declined so to rule, and upon this point instructed the jury as follows: "Up to the time this structure commenced to fall, where was the life of the building? Was it extinct, or was it not? If the building was still alive in the sense it is used here, then the tenants, the trustees, would be the persons liable; but if, on the other hand, the life of the building had become extinct before that time, it would be the owners who would be liable." To the refusal of the court to give the instruction as requested, and to the instructions actually given, the defendants excepted.

We think the instruction should have been given. The leasehold estate was to exist only during "the life of the building," and the real question is whether the evidence was sufficient to warrant a finding that, within the meaning of the lease, the "life of the building" had not terminated. The building was three stories in height, and had brick walls. The premises described in the lease were "all that part of the brick building known as 'Masonic Block,' situated on the corner of Elm and Arnold Streets in said Westfield, above and including the third floor of said building, together with the stairs and stairway leading from the second to the third floor of said building, to their sole use. Also the hall upon the second floor, the front and rear stairways leading to the same, and the front and rear entrances and halls leading to said stairways, to be used and occupied by said party

of the second part in common with the parties owning and occupying the other portions of said building, and their heirs and assigns."

We understand the hall upon the second floor to be not a room, but simply an entry to and from which stairways led.

The lease also contained the following: "And the party of the first part doth also lease, demise, and let unto the party of the second part the box or cupboard in the northwest corner of said building, and in the second story, to be used in connection with the third story in substantially the same manner and to the same extent as now used by said Lodge, and also the water pipes leading from the tank through the first and second stories of said building, to the drain leading to the brook, with the right to use and enjoy the same in the same manner and to the same extent that the party of the first part is entitled under said agreement between said Gillett and said party of the first part. It is also agreed that the party of the second part shall have, exercise, and enjoy all the rights and privileges to which the party of the first part is entitled, under said agreement last mentioned, subject to the restrictions and liabilities therein contained, and shall also have the right and privilege at all reasonable times, whenever necessary, to enter upon the portion of said building not herein demised, and the premises upon which the same is situated, for the purposes of examination and repair of said pipes leading from said tank, and the drain or pipe leading from the cellar, and of the box or cupboard in the second story before mentioned, and the gas pipes for the use of the third story, and for the purpose of rebuilding or replacing said pipes, drain, and cupboard and gas pipes, whenever, during the life of said building, the same shall become ruinous and decayed."

The lessees hired the premises for a Masonic Hall, and the lease was upon the condition that, if the premises should cease to be used and occupied as such, the lessors might enter and repossess the same as of their former estate.

The lessees entered into several covenants, among which were the covenants to pay "all taxes and other duties levied, or to be levied, on all that part of said building above the third floor, and to keep the same, including the third floor and the stairs

and stairway leading from the second to the third floor, in good and substantial repair, during the life of said building"; and they also agreed "to pay one quarter part of all the expense of keeping in repair all such portions of said building as are to be used in common with the owners and occupiers of the other portions, as before provided in this agreement."

There were also other covenants and agreements not material to the question under consideration. The lessors made no covenant as to repairs.

At the time of the execution of the lease the lessors were the owners of the land and building, except that Gillett, who was not a party to the lease, was the owner of the south half below the third floor; and, subject to the lease, the title so continued in them or their heirs (some of the lessors having meanwhile died) up to the time the wall fell.

Here, then, is a lease of all of the building above and including the third floor, with such rights in entries and stairways leading to the street as are incidental to the reasonable enjoyment of that part of the building, — the lessors owning the north half of the lower part of the building and the land under the whole building, and Gillett, a third party, owning the other half of such lower part. And this lease is to continue during the life of the building, the lessees agreeing to repair and the lessors not agreeing to repair either the demised premises or any other part of the building. The covenant to repair bound the lessees to rebuild in case of fire unless the term of the lease had expired. *Leavitt v. Fletcher*, 10 Allen 119, and cases therein cited.

In these circumstances, what is the reasonable interpretation of the phrase "life of the building"? Shall it be so interpreted as to mean that the building is alive so long as there is standing any part of it which can be used as a building? If so, then if all above the second floor is destroyed, walls and all, but the first floor can be occupied, it is the duty of the lessees to erect in the air as best they can, that part of the building demised by the lease. This does not seem to us a reasonable interpretation.

We think the life of the building may be said to have terminated, within the meaning of this lease, when the building has

been injured by fire or other cause to such an extent as substantially to destroy the part demised, and to render it impracticable for the lessees to perform the covenant to rebuild such part except by rebuilding other important parts of the building not covered by the lease.

Upon this interpretation of the phrase there can be no doubt that, as matter of law upon the evidence, the life of the building was terminated by the fire.

It was not in dispute that after the fire, and before the injury to the plaintiff's property, the roof was entirely gone, and so also was the third floor, except a "little corner" near the north wall, upon which the safe stood. The evidence, especially that given by the plaintiff and his witnesses, clearly showed that the second floor was much burned and practically useless, and that the walls were bulging out in places, and in parts were in such a weakened condition as to fall by reason of wind of no "greater violence than defendants ought reasonably to have anticipated." We have examined also the photographs used at the trial. Without reciting herein the evidence in detail, it is sufficient to say that it clearly and indisputably shows that after the fire the part demised was substantially destroyed, and that it was impracticable to rebuild the same except by rebuilding other important parts of the building not demised.

Without considering, therefore, whether the contention of the defendants that they were not the successors of the lessees above named is open to them on the bill of exceptions, or the other points presented, we are of opinion, for the reasons above stated, that the entry should be,

Exceptions sustained.

FREDERICK H. CAPPER, executor, *vs.* PORTER F. CAPPER.

Suffolk. December 12, 1898. — December 13, 1898.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Will — Issues to Jury — Undue Influence — Motion for New Trial — Discretion of Presiding Justice.

Where, on an issue whether an alleged will was procured through the undue influence of the testator's son, no exception is taken to any ruling and no request for instructions is made, and the jury returns a verdict in favor of the will, a motion for a new trial, on the ground that the finding of the jury is against the law and the evidence and the weight of the evidence, is addressed to the discretion of the justice who heard the case, and cannot be revised by this court.

APPEAL, by Porter F. Capper, an heir at law and one of the next of kin of Thomas H. Capper, from a decree of the Probate Court admitting to probate an instrument purporting to be his last will, which, omitting the formal parts, is as follows :

"I give and devise to my son, Frederick Henry Capper, all my real and personal estate to hold to him and his heirs, but with the exception therefrom of one hundred dollars, which sum of one hundred dollars I give and bequeath to my son, Porter Fader Capper. I appoint my said son, Frederick Henry Capper, executor of this my will, and request that no sureties be required on his official bond as executor."

The case was heard by *Lathrop, J.*, who entered a decree reversing the decree of the Probate Court, and reported the case for the determination of the full court. The facts appear in the opinion.

H. N. Shepard, for the appellee.

S. C. Brackett, for the appellant, was not called upon.

FIELD, C. J. On issues to a jury tried before a justice of this court the jury found that the execution of the alleged will was procured "through the undue influence of" Frederick H. Capper, a son of the testator. The jury also found that the alleged will was executed in due form, and that the testator was of sound mind at the time of the execution. No exception was taken to any ruling of the presiding justice at the trial. The

executor filed a motion for a new trial upon the issue of undue influence, which was the third issue, on the ground that the finding of the jury was "against the law and the evidence and the weight of the evidence," and he also asked that this issue to the jury be discharged. This motion was overruled, and the executor appealed to the full court. The presiding justice has reported all the evidence introduced at the trial on the issue of undue influence. The report recites: "The sole question which the executor seeks to raise being whether the evidence was sufficient to warrant a finding that the execution of the alleged will was procured by the undue influence of Frederick H. Capper." The report also recites: "The contestant contends that, as the executor took no exception at the trial, and asked for no ruling, and as the motion filed after the trial was overruled, the question sought to be raised by the executor is not now open to him." This question also is reported to the full court.

A motion for a new trial, on the ground that the verdict is against the law and the evidence, is usually addressed to the discretion of the presiding justice. If an aggrieved party could have required the presiding justice at the trial to rule upon the sufficiency of the evidence to warrant the jury in finding affirmatively a particular issue and neglected to do so, he cannot as of right require the presiding justice, on a motion for a new trial, to make a ruling on the subject or to report the evidence. New trials often are granted on the ground that the verdict is against the evidence, even when there was some evidence to support the verdict proper to be submitted to the jury. Unless, on the hearing of such a motion, the facts in some proper way are separated from the law, there is no question of law arising from the decision on the motion which can be carried to the full court. But the presiding justice may, if he chooses, in deciding such a motion report the evidence to the full court, and, if he does so, there may be a question of law which the full court can consider.

Without deciding in the present case whether the presiding justice intended to report any question of law if the executor had no right to raise the question, we deem it best to say that we have read the evidence reported, and are of opinion that it

is sufficient to warrant the verdict of the jury on the third issue.* There is no question of law or fact before us on the appeal from the decree of the single justice disallowing the will, and that decree must be affirmed. The order overruling the motion of the executor for a new trial upon the third issue must also be affirmed. *So ordered.*

CLARENCE MURPHY vs. COMMONWEALTH.

Suffolk. June 22, 1898. — January 3, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, LATHROP,
BARKER, & HAMMOND, JJ.

*Writ of Error — Validity of Sentence — Unconstitutionality of ex post facto
Law — Statute.*

On a petition for a writ of error to reverse a sentence of the Superior Court, by which the petitioner was confined in the State prison, it appeared that the offences of which he was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced on May 28, 1896, under St. 1896, c. 504, entitled "An Act relative to sentences to the state prison," which took effect on January 1, 1896. As the law stood when the offence was committed, the petitioner was entitled to a deduction for good behavior, and to a permit to be at liberty for the time thus deducted on such terms as the prison commissioners should fix and subject to revocation by them. *Held*, that, as to the petitioner, the statute of 1896 was void as an *ex post facto* law, and that the case must be remanded to the Superior Court for sentence, according to the law as it was before the passage of the statute.

WRIT OF ERROR, to reverse a judgment rendered for the Commonwealth, on May 28, 1896, of the Superior Court for the

* There was evidence for the contestant tending to show that Frederick threatened his father with violence if he should leave anything to Porter, that Frederick was offended with Porter on account of his marriage, that Porter was on good terms with his father, that the latter declared that he should divide his property equally between his two sons, and that he was afraid of Frederick. There was evidence for the appellee tending to contradict much of the above testimony, and to show that a memorandum which preceded the will was drawn by Frederick at his father's dictation, and that the father declared that he should give all his property to Frederick, as it would be a waste of money to give anything to Porter, and that he could not trust Porter in business matters.

County of Essex, upon an indictment charging the plaintiff in error with embezzlement. Plea, *in nullo est erratum*. The facts appear in the opinion.

The case was argued at the bar in June, 1898, and afterwards was submitted on briefs to all the justices.

E. F. McClennen, for the plaintiff in error.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

MORTON, J. This is a petition for a writ of error to reverse a sentence of the Superior Court for the County of Essex by which the petitioner is confined in the state prison. The plea is *in nullo est erratum*, and therefore admits the facts well assigned in the petition. *Bodurtha v. Goodrich*, 3 Gray, 508, 512. *Conto v. Silvia*, 170 Mass. 152. From those and from the record of the Superior Court, it appears that the offences of which the petitioner was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced under St. 1895, c. 504, entitled "An Act relative to sentences to the state prison," which took effect on the first day of January, 1896, and which provides, in § 1, that "when a convict is sentenced to the state prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted, and the minimum term shall not be less than two and one half years."

The petitioner was indicted under Pub. Sts. c. 203, § 40, and was found guilty on sixty-three counts, each of which, except in a few instances, alleged the value of the property stolen to be more than one hundred dollars. The penalty is prescribed in § 20 of the same chapter, and is imprisonment in the state prison not exceeding five years, or fine not exceeding six hundred dollars and imprisonment in the jail not exceeding two years, if the value of the property stolen exceeds one hundred dollars. The maximum sentence imposed in the present case was not more than fifteen years and the minimum not less than ten. The maximum term was therefore only a small fraction of

that authorized by law, and it is agreed that it probably does not exceed the sentence which would have been imposed before the passage of St. 1895, c. 504.

The error assigned is, that the sentence and the commitment pursuant to it were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*, and contrary to Section 10, Article 1, of the Constitution of the United States, and to Article 24 of the Declaration of Rights of the Constitution of Massachusetts.

The statute was considered by this court in *Commonwealth v. Brown*, 167 Mass. 144, 146, and again in *Oliver v. Oliver*, 169 Mass. 592. It was also before the court in *Commonwealth v. Crowley*, 168 Mass. 121. In *Commonwealth v. Brown*, the court says that it sees no reason why the statute should not be construed to apply to all sentences in the cases referred to in it passed after it went into effect. But it is evident that the attention of the court was directed more to the effect of the feature of indeterminate sentences upon the constitutionality of the statute than to other matters. The fact that the statute might interfere with his rights or privileges in regard to a permit to be at liberty and was therefore objectionable as *ex post facto* was not suggested in the defendant's brief. In *Oliver v. Oliver*, the point decided was that a sentence imposed under the statute in question must be regarded as a sentence for the maximum term, and not for the minimum or any intermediate term. The point now raised was not involved nor considered in that case. *Commonwealth v. Crowley* followed *Commonwealth v. Brown*. There was in the opinion no discussion of the statute, and the motion in arrest of judgment did not aver that the statute was unconstitutional because of its interference with the defendant's rights to a permit to be at liberty for good conduct under Pub. Sts. c. 222, § 20, or otherwise. An examination of the defendant's brief shows that the ground on which it was contended that the statute was unconstitutional was the indeterminate feature of the sentences. This had been fully considered and disposed of in *Commonwealth v. Brown*, and hence a reference to that case was all that was necessary. We discover nothing in either of these cases which precludes us from examining the question now presented. The statute was also considered by the United States

Circuit Court for the First Circuit when this plaintiff was before it recently on a petition for a writ of *habeas corpus*, which it was led to deny, and to leave the petitioner to his writ of error, largely, as we infer, on account of the views concerning the statute which this court was supposed to have expressed in the two cases of *Commonwealth v. Brown* and *Oliver v. Oliver*, referred to above. *In re Murphy*, 87 Fed. Rep. 549.

We have already quoted § 1 of the act. By § 2 it is provided that at any time after the expiration of the minimum term the commissioners of prisons may issue a permit to the convict to be at liberty on such terms and conditions as they may deem best, and may revoke the permit at any time previous to the expiration of the maximum term. The permit shall not be issued without the approval of the Governor and Council or unless the commissioners shall be of the opinion that the convict will lead an orderly life if set at liberty. Other provisions contained in the act were taken from St. 1884, c. 152, §§ 1 and 2, which will be referred to later.

The statutes applying to the petitioner's case which were in force when he committed the offences of which he was convicted are Pub. Sts. c. 222, §§ 20, 21, 22, and St. 1884, c. 152. There were and are statutes relating to the issue of permits to persons confined for drunkenness in jails, houses of correction, or other places under the jurisdiction of the county commissioners, or in the county of Suffolk under that of the board of directors of public institutions and who have reformed, and also to persons imprisoned in the reformatory prison for women who have reformed. But those are not applicable to this case.

Pub. Sts. c. 222, § 20, provide that every officer in charge of a prison or other place of confinement shall keep a record of each person whose term is not less than four months and "every such prisoner whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment shall be entitled to a deduction from the term of his imprisonment to be estimated as follows," stating it. Later in the section, it is provided: "Each prisoner who is entitled to a deduction . . . shall receive a written permit to be at liberty during the time thus deducted upon such terms as the board granting the same shall fix." The permits are to be issued to

prisoners in the state prison by the commissioners of prisons, and they "may at any time revoke the same, and shall revoke it when it comes to their knowledge that the person to whom it was granted has been convicted of any offence punishable by imprisonment."

St. 1884, c. 152, § 1, provides that if the holder of a permit shall violate any of its terms or conditions, or any law of this Commonwealth, "such violation shall of itself make void said permit." Section 2 provides that, when any permit has been revoked or has become void, the board granting it may cause the holder of it to be arrested and returned to the place in which he was confined, and when so returned he "shall be detained therein according to the terms of his original sentence," and "the time between his release upon said permit and his return to said place of confinement shall not be taken to be any part of the term of the sentence." These provisions are embodied in St. 1895, c. 504, and are the ones previously referred to. The other provisions of St. 1884, c. 152, are not now material.

From this examination it appears that St. 1895, c. 504, differs from the statutes which were in force at the time when the offences were committed, and that the differences consist, first, in the matter of indeterminate sentences; secondly, in providing that the permit shall not be issued till after the expiration of the minimum sentence, and in omitting any provision for deductions for good behavior; and, thirdly, in leaving the issue of the permit to the discretion of the commissioners, and in providing that it shall receive the approval of the Governor and Council. The petitioner contends that the effect of these differences may be to make the term of imprisonment longer than it would have been under the laws in force at the time the offences were committed, and to change his position in other respects to his disadvantage, and that therefore the statute is unconstitutional and void. The Commonwealth contends that the provisions are in the nature of prison discipline, or of penal administration or criminal procedure, and are not therefore open to the objection of being *ex post facto*.

As the term *ex post facto* has been construed, it applies only to penal or criminal matters. The objection to *ex post facto* legislation consists in the uncertainty which would be intro-

duced thereby into legislation of a penal or criminal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner from that in which it was punishable when done. But not all retrospective legislation is unconstitutional as being *ex post facto*. The question in each case is whether it will increase the penalty, or operate to deprive a party of substantial rights or privileges to which he was entitled as the law stood when the offence was committed, or "in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage." *Kring v. Missouri*, 107 U. S. 221, 228. *Calder v. Bull*, 3 Dall. 386. *Cumming v. State*, 4 Wall. 277. *Ex parte Garland*, 4 Wall. 333. *Medley, petitioner*, 134 U. S. 160. *Duncan v. Missouri*, 152 U. S. 377. *Thompson v. Utah*, 170 U. S. 343. *Hartung v. People*, 22 N. Y. 95. *Shepherd v. People*, 25 N. Y. 406. *Ratzky v. People*, 29 N. Y. 124. A statute which mitigates the penalty is not objectionable, though passed after the offence; (*Commonwealth v. Wyman*, 12 Cush. 237; *Commonwealth v. Gardner*, 11 Gray, 438; *Dolan v. Thomas*, 12 Allen, 421, 424;) nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be in the last two instances to enhance the severity of the confinement. *Duncan v. Missouri*, 152 U. S. 377. *Cook v. United States*, 138 U. S. 157. *Hopt v. People*, 110 U. S. 574. *Gut v. State*, 9 Wall. 35. *Commonwealth v. Hall*, 97 Mass. 570. *Carter v. Burt*, 12 Allen, 424. *Hartung v. People*, 22 N. Y. 95. *Marion v. State*, 20 Neb. 233. *Ex parte Bethurum*, 66 Mo. 545. *People v. Mortimer*, 46 Cal. 114. *Cooley*, Const. Lim. (3d ed.) 272. *Black*, Const. Law, § 184. No one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. But the Legislature, under the guise of laws relating to procedure or prison discipline or penal administration, cannot take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offence was committed. *Kring v. Missouri*, 107 U. S. 221, 232. *Thompson v. Utah*, 170 U. S. 343. *Medley, petitioner*, 134 U. S. 160. To

deprive him in any manner of such right or privilege would be to increase the penalty. In determining in any case whether this is or is not the effect of a statute, it is to be borne in mind that the constitutional provision was intended as a security to life and liberty, and as a safeguard against the infliction of any punishment except such as was duly authorized by law, and it is to be construed so as to promote these ends.

As the law formerly stood in this State the effect of good conduct on the part of the prisoner was to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term. St. 1857, c. 284. St. 1858, c. 77. St. 1859, c. 108. Gen. Sts. c. 178, § 47. This was so said in the *Opinion of the Justices*, 13 Gray, 618. And although the St. of 1857, c. 284, was entitled "An Act concerning the discipline of the state prison," and the acts of 1858 and 1859 were respectively entitled "An Act concerning the discipline of jails and houses of correction," and "An Act to amend an Act concerning the discipline of jails and houses of correction," it does not seem to have occurred to the Justices that the right of the convict was affected thereby. They declared, on the contrary, that the act of 1857, upon the construction of which the answer to the question proposed mainly depended, gave the convict a right to have his term reduced and shortened by the scale provided in it for good behavior, and bore upon the sentence and shortened the term of imprisonment, and afforded "an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit of an earlier release." And again they said that "the benefit promised, in consideration of good behavior, was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." It would seem plain, therefore, that a subsequent statute which interfered to his disadvantage with the right of deduction for good behavior to which a convict was entitled at the time of the commission of the offence under the acts of 1857, 1858, and 1859, would have been unconstitutional and void, notwithstanding the fact that those acts related, according to their titles, to the discipline of the state prison, and to that of jails and houses of correction, and therefore appeared to pertain to prison regulation. To have taken

away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been in effect to lengthen the sentence which was provided by law for the offence at the time when it was committed; and a statute which did that clearly would have been *ex post facto*. See *Opinion of the Justices*, 13 Gray, 618; *Kring v. Missouri*, 107 U. S. 221; *Medley, petitioner*, 134 U. S. 160; *Thompson v. Utah*, 170 U. S. 343; *Commonwealth v. McDonough*, 18 Allen, 581; *In re Canfield*, 98 Mich. 644; *Ex parte Hunt*, 28 Tex. App. 361.

The question then is whether the changes made in regard to deductions for good behavior by St. 1880, c. 218, which were subsequently incorporated into and are now found in Pub. Sts. c. 222, § 20, have so modified the rights which convicts had, under statutes previously in force, that those committing offences after the passage of St. 1880, c. 218, cannot be said to have anything in the nature of a right to deductions for good conduct, and to a permit to be at liberty which could not be interfered with to their disadvantage by subsequent legislation, — in other words, whether the effect of St. 1880, c. 218, and of the Public Statutes, has been and is to make deductions for good behavior and the issuing of a permit a matter of favor, and not in any sense a matter of right.

It should be noted in passing, that the words "with the consent of the Governor and Council," were inserted in Gen. Sts. c. 179, § 51, which, with one other amendment that is not now material, is a re-enactment of St. 1857, c. 284, § 1. These words were not in the Commissioners' Report (c. 180, § 50), and it does not appear how they came to be inserted. They were not in Gen. Sts. c. 178, § 47, and were omitted from St. 1880, c. 218, and are not found in any subsequent statute.

It seems to us that, under St. 1880, c. 218, and Pub. Sts. c. 222, § 20, the convict was and is entitled to deductions for good conduct, and to a permit to be at liberty for the time thus deducted, as a matter of right rather than of favor. The object was to furnish an incentive to good conduct while the convict was in confinement, by offering him a reward therefor. Applying the language of the *Opinion of the Justices*, *ubi supra*, the provisions of St. 1880, c. 218, and of the Public Statutes, "afford an assurance of the highest character that, upon condition of good

behavior, the convict shall have the promised benefit" of certain deductions, and a permit to be at liberty for the time thus deducted from the term of his sentence. Though the provisions of St. 1880 and of the Public Statutes may not bear as directly upon the sentence as those of St. 1857 did, we cannot doubt that the purpose was to secure to the convict a substantial advantage as a reward for his good conduct, which practically would have the effect of shortening his sentence. It is true that the prison commissioners could revoke the permit without cause shown, or for a violation of its terms, and that they are bound to revoke it when they have knowledge that the convict has been convicted of an offence punishable by imprisonment. But this does not affect the right of the convict to deductions, and to a permit in the first instance. Besides, it is to be assumed that the power of revocation will not be exercised capriciously. Unless the provisions of the statute were intended to secure a substantial advantage to the convict as a reward for his good conduct, to the enjoyment of which he could look forward with reasonable certainty, if he did not violate the terms of the permit, nor commit an offence punishable by imprisonment, it is difficult to see what object the Legislature had in view.

Conlon's case, 148 Mass. 168, is relied on as tending to show that the convict had no right to a permit. One of the contentions of the petitioner in that case was that his confinement in the reformatory was unlawful, because his removal to it from the state prison to which he had been sentenced interfered with or took away his right to deductions for good conduct, under Pub. Sts. c. 222, § 20. But neither that statute nor St. 1880, c. 218, of which it was a re-enactment, was in force at the time when the petitioner committed the offence of which he was convicted, and no question under either was properly before the court. Further, deductions for good conduct under Pub. Sts. c. 222, § 20, are not limited to persons confined in the state prison, but extend to those confined in "a prison or other place of confinement," and the Legislature had the right to change the place of confinement of any prisoner so long as the penalty was not thereby aggravated. *Carter v. Burt*, 12 Allen, 424. Lastly, the permit in that case was issued under St. 1884, c. 152, and was revoked by the commissioners for a violation of its con-

ditions, as they had the right to do. The decision would have been the same if the permit had issued under Pub. Sts. c. 222, § 20, and had been revoked for a like cause. The nature of the right to a permit under Pub. Sts. c. 222, § 20, was therefore not material to the decision.

For these reasons the case, though rightly decided, cannot be regarded as authoritative on the question now before us. And we think, as has been already observed, that St. 1880, c. 218, and Pub. Sts. c. 222, § 20, secured to prisoners who were convicted of offences committed when they were in force, and who came within their scope, deductions for good conduct and permits to be at liberty as something to which they were entitled as of right rather than by favor, for faithful observance of the rules, and for not having been subjected to punishment, and that their rights in these respects could not be taken away or interfered with to their disadvantage by subsequent legislation.

The next question is whether St. 1895, c. 504, alters or may alter to their disadvantage in a substantial manner the position of those committing offences prior to its passage and while Pub. Sts. c. 222, § 20, was in force. We think that it is clear that such might be its effect. In case the maximum sentence was for fifteen years, the convict would be entitled for good conduct to deductions under Pub. Sts. c. 222, § 20, which would shorten the term to twelve. Under St. 1895, c. 504, however, he could be sentenced for a maximum term of fifteen years and a minimum of thirteen, or of any number less than fifteen and more than twelve. In the present case the minimum was ten, and it is possible that the statute might operate more beneficially in the case of the petitioner than Pub. Sts. c. 222, § 20, and St. 1884, c. 152, would have operated. But that cannot avail. A law cannot be constitutional in some cases and unconstitutional in others involving like circumstances and conditions. If it is unconstitutional as to any, it is unconstitutional as to all.

It is suggested in *In re Murphy*, 87 Fed. Rep. 549, that the supposed leniency of St. 1895, c. 504, might have led the court to make the maximum sentence longer than it otherwise would, and the implication is that this also would render the statute objectionable as to past offences. But it is obvious that this argument might prevent the application of any mitigative stat-

ute to past offences, and we should hesitate to pronounce the act unconstitutional on that ground.

It is also said in *In re Murphy*, that under St. 1895, c. 504, "important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely. The most serious new provision is that the act of 1895 directs that, if a permit is revoked, no portion of the time the prisoner may have been at liberty under it shall be taken to be any part of the term of his sentence." But this last provision, which is called "the most serious new provision" of St. 1895, is found in Pub. Sts. c. 222, § 21, and in St. 1884, c. 152, § 2, and was not therefore new, and was in force when the offences were committed of which the petitioner was convicted, and applied to persons confined in the state prison. So far as the revocation of permits is concerned, it is doubtful if St. 1895, c. 504, adds anything new. Under Pub. Sts. c. 222, § 20, the commissioners have power, as already observed, to revoke permits without cause shown. They have the same power under St. 1895, c. 504. Under St. 1884, c. 152, a violation by the holder of a permit of any of its terms or conditions, or of any law of this Commonwealth, rendered the permit void. The same is true under St. 1895, c. 504. And the provisions as to the return of the holder of a permit which has been revoked or has become void are the same in St. 1895, c. 504, as in St. 1884, c. 152, except that the latter contains a provision that the order for the arrest and return of the convict may be served by any officer authorized to serve civil or criminal process in any county in the Commonwealth which is omitted from St. 1895, c. 504. So far, therefore, as revocation and the results which follow it, and violation of the terms and conditions of the permit, or of any law of the Commonwealth, and the results which follow that are concerned, there would seem to be nothing in the statute of 1895 which as compared with the laws in force when the offence was committed changes the situation of the petitioner for the worse.

The petitioner further contends that, independently of the effect of the statute upon his right to deductions for good behavior and to a permit to be at liberty, the statute is inoperative as an *ex post facto* act because it renders the duration of his

sentence uncertain, and gives to the prison commissioners the power to fix the term of his imprisonment. But there is no uncertainty in the sentence itself. That, it has been held, is in effect for the maximum term. *Oliver v. Oliver*, and *Commonwealth v. Brown*, *ubi supra*. *People v. Illinois State Reformatory*, 148 Ill. 413. *State v. Peters*, 43 Ohio St. 629. The convict may be released before its expiration, either by an absolute or conditional pardon from the Governor, (Pub. Sts. c. 218, §§ 12 *et seq.*,) or after the expiration of the minimum term by a permit from the commissioners approved by the Governor and Council. In the latter case, he is under sentence till the expiration of the maximum term. *Oliver v. Oliver*, *ubi supra*. It is as correct, it seems to us, to say that the duration of his sentence is uncertain because the Governor may pardon him absolutely or conditionally at any time, as it is to say that it is uncertain because after the expiration of the minimum term the commissioners may release him before the expiration of the maximum term on a permit approved by the Governor and Council, and as correct to say that in case of a pardon the Governor fixes the term of imprisonment, as to say that in case of release upon a permit the commissioners fix it. Moreover, "the form of sentence," as was said in *Commonwealth v. Brown*, "is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question." In no just sense can it be said, we think, that the duration of his sentence is uncertain, or that the determination of the term of the imprisonment is taken from the courts where it belongs, and left to the prison commissioners. See *People v. Illinois State Reformatory*, 148 Ill. 413; *George v. People*, 167 Ill. 447; *State v. Peters*, 43 Ohio St. 629; *Milner v. State*, 40 L. R. A. 109; *contra*, *People v. Cummings*, 88 Mich. 249.

The petitioner also insists that requiring the approval of the Governor and Council to a permit is a serious interference with his rights, and without anything more would render the statute void as an *ex post facto* law. But we think that the provision does not affect any substantial right to which the petitioner was entitled when the offences were committed, but relates rather to a matter of procedure.

There can be no doubt, we think, that in the matter of per-

mits the Legislature could have substituted some other tribunal for the prison commissioners, or could have added to the number of the commissioners on the same principle that it could have abolished the court which existed when the offences were committed, and have created another court for the trial of such offences, or have added to the number of the judges of the existing court. If this had been the only change, the effect of it would have been merely to require that so many more persons should act in regard to the matter of permits. The petitioner would have still been entitled to deductions for good behavior, and to a permit to be at liberty during the time of such deductions, and there would have been no increase in the penalty for the offence or other change to his disadvantage. It is not contended that the terms and conditions of permits issued when the offence was committed, or the rules of government of the prison then in force, must remain the same.

By St. 1898, c. 371, which is in amendment of and in substitution for St. 1895, c. 504, and which went into effect since the indictment was found in this case, it is now provided that a convict who has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to release at the expiration of the minimum term, and shall be given a permit to be at liberty during the unexpired portion of the maximum term, which permit shall be issued by the commissioners of prisons. The approval of the Governor and Council is no longer required, and the permit is no longer to be issued at the will and pleasure of the commissioners.

We think, therefore, that the statute of 1895 could not be declared unconstitutional as an *ex post facto* act because it requires the approval of the Governor and Council to permits to be at liberty, or because it renders the duration of the sentence uncertain, or gives the prison commissioners power to fix the term of imprisonment; but we think that, as the law stood when the offence was committed, the petitioner was entitled to a deduction for good behavior, and to a permit to be at liberty for the time thus deducted, on such terms as the prison commissioners should fix, and subject to revocation by them, and if sentenced under the statute of 1895, this right might be interfered with to his disadvantage, and that the statute is therefore inop-

erative and void as an *ex post facto* law. We do not see how the statute can be construed as merely a measure of prison discipline or regulation, and therefore liable to change from time to time as the Legislature may see fit without interfering with any rights on the part of the convict.

We have assumed thus far that the act of 1895 applied to all cases of convicts sentenced to the state prison after it took effect, except such as are sentenced for life or as habitual criminals. But we think that it is doubtful, notwithstanding the generality of the language, whether it should be so construed. It is manifest that convicts sentenced under St. 1895 are not entitled to the benefits of Pub. Sts. c. 222, § 20. The sentence is intended to be different in character from that referred to in § 20, and the provisions of that section in regard to deduction for good behavior could not be applied to a sentence under the statute of 1895. Section 20 of the Pub. Sts. c. 222, so far as it relates to convicts sentenced to the state prison, is not repealed in terms by that statute. To hold that that statute operates by necessary implication as a repeal of it to that extent, as it would seem that we should be obliged to do if the statute of 1895 is construed to apply to all sentences to state prison after it took effect, whether the offences occurred before or after it went into operation, (*Flaherty v. Thomas*, 12 Allen, 428, and *Commonwealth v. McDonough*, *ubi supra*,) would result in the discharge of all persons who might have been sentenced under it to the state prison for offences committed before it took effect. On the other hand, by construing it, as we think properly may be done pursuant to the general rule that statutes are to be construed prospectively, to apply to sentences for offences committed after it took effect, this difficulty will be avoided. See Pub. Sts. c. 3, § 3, cls. 1, 2; *Commonwealth v. Sullivan*, 150 Mass. 315; *Commonwealth v. Desmond*, 123 Mass. 407; *King v. Tirrell*, 2 Gray, 331; *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Gardner v. Lucas*, 3 App. Cas. 582, 590; *Lambard*, appellant, 88 Maine, 587.

The result is that, the only error being an error in the sentence, and the Superior Court having jurisdiction to impose such sentence as should be imposed, the sentence in question, in the opinion of a majority of the court, must be reversed, and the case

remanded to that court for sentence according to the law as it was at the time when the offences were committed before the passage of St. 1895, c. 504. *Jacquins v. Commonwealth*, 9 Cush. 279. Pub. Sts. c. 187, § 13. *So ordered.*

MARY NUGENT vs. GREENFIELD LIFE ASSOCIATION.

Bristol. October 24, 1898. — January 3, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Assessment Life Insurance — Statute — Discrepancies between Original Application and Copy — Misrepresentations — Defences.

Where, in an action upon a policy of life insurance, there are discrepancies of substance between the original application and the copy annexed to the policy, a finding that the copy so annexed is not a correct copy within the meaning of § 21 of St. 1890, c. 421, entitled "An Act relating to assessment insurance," and a ruling that defences founded upon alleged misrepresentations in the application are not open to the defendant, are correct.

CONTRACT, upon a policy of insurance for \$2,000, issued by the defendant on the life of Patrick J. Nugent, and made payable to the plaintiff, who was his mother. Trial in the Superior Court, before *Richardson, J.*, who made certain rulings stated in the opinion, and reported the case for the determination of this court. If any of the rulings were wrong, the verdict was to be set aside and a new trial ordered; otherwise, the verdict was to stand, and judgment was to be entered for the plaintiff. The facts appear in the opinion.

H. A. Dubuque, for the defendant.

J. W. Cummings, (*E. Higginson & C. R. Cummings* with him,) for the plaintiff.

BARKER, J. Our statutes deal differently with assessment insurance, the contracts of fraternal beneficiary organizations, and ordinary premium insurance. The principal respective enactments are St. 1890, c. 421, governing assessment insurance; St. 1898, c. 474, relating to the operations of fraternal benefit organizations; and St. 1894, c. 522, which regulates

ordinary premium insurance. Neither of these statutes is generally, or as of course, applicable to the kinds of insurance regulated by the other acts. See St. 1890, c. 421, §§ 1, 27; St. 1898, c. 474, § 22; St. 1894, c. 522, §§ 2, 3.

The present defendant is an assessment insurance company, organized under St. 1890, c. 421, entitled, "An Act relating to assessment insurance," and the contract or policy on which it is sued in this action is one of assessment insurance, and therefore is governed by the provisions of that statute.

The declaration is upon a policy written on July 7, 1896, on the life of the plaintiff's son, who died on August 25, 1896. The answer, in addition to a general denial, alleged that the policy was issued upon representations in an application therefor, and which were part of the policy, and were false and untrue, and made with an actual intent to deceive, and were false as to matters increasing the risk of loss, and also that the insured warranted the truth of his answers in the application, and that the warranties were untrue. At the trial, it was admitted that the policy was issued pursuant to a written application, a copy of which purported to be annexed to the policy. Upon comparing this supposed copy with the original application a number of differences between them were pointed out, and the presiding justice found that the copy attached to the policy was not a correct copy as required by law, and for that reason ruled that the original application was not admissible in evidence.

In putting in its defence, the defendant offered to show that the answers of the insured to certain questions in the application and in the medical examiner's report, which it contended was part of the application, were false, fraudulently made with intent to deceive, and that they materially affected the risk. The presiding justice refused to admit the evidence, and ruled that the defendant, having failed to comply with St. 1890, c. 421, § 21, could not put in evidence of the untruth of answers of the insured in his application or in the part relating to the medical examination and refused to allow the defendant to put in any evidence tending to show that the insured made false answers. The question for decision is whether these rulings were correct.

This statute was not the first instance in which our Legisla-

ture regulated the form of policies and the construction to be given to insurance contracts. By St. 1861, c. 152, it provided that in fire insurance the conditions of the insurance should be stated in the body of the policy, and that neither the application of the insured nor the by-laws of the company, as such, should be considered as a warranty or as a part of the contract. This provision was so changed by St. 1864, c. 196, as to provide that neither the application nor by-laws should be considered as a warranty or a part of the contract except so far as incorporated in full into the policy and so appearing on its face. See Pub. Sts. c. 119, § 138; St. 1887, c. 214, § 59; St. 1894, c. 522, § 59. By St. 1878, c. 157, it was provided that no misrepresentation made in obtaining a policy of fire or life insurance should be deemed material, or defeat or avoid the policy or prevent its attaching, unless made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss. See Pub. Sts. c. 119, § 181; St. 1887, c. 214, § 21; St. 1894, c. 522, § 21. See also *White v. Provident Savings Life Assurance Society*, 163 Mass. 108; *Levie v. Metropolitan Ins. Co.* 163 Mass. 117; *Stocker v. Boston Mutual Life Association*, 170 Mass. 224; St. 1895, c. 271, § 1; and St. 1895, c. 281, § 1.

The earliest provision requiring a correct copy of the application to be contained in or attached to every policy which contains any reference to the application, either as forming part of the policy or contract, or having any bearing on the contract, is found in the statute under which the defendant was incorporated. St. 1890, c. 421, § 21. This section is quite full and minute in its directions, and a penalty is provided in a subsequent section for neglecting to comply with any provision of the act. St. 1890, c. 421, § 26. One provision of § 21 is that, "unless so attached and accompanying the policy, no such application . . . shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties."

A somewhat similar provision with reference to applications for life insurance was incorporated into the general law regulating premium insurance by St. 1893, c. 434, now re-enacted in St. 1894, c. 522, § 73. This provision came before the court in

Considine v. Metropolitan Ins. Co. 165 Mass. 462, and it was there held that the provision was applicable to all premium life insurance, that where it rendered the application inadmissible and forbade it to be considered as part of the contract the defendant could not show what was said by the insured at the time of his medical examination, and that the provision was within the constitutional power of the Legislature. After this decision the section now under discussion, St. 1890, c. 421, § 21, was before this court in *Boyden v. Massachusetts Masonic Association*, 167 Mass. 242, so far as it related to the by-laws of the insurer, and, no copy of the by-law being contained in or attached to the policy, it was held that the rights of the parties must be determined as if there were no such by-law.

The policy sued on in the present case differs from those before the court in the two cases last cited, in that there is annexed to it what purports to be a copy of the application, while in those cases no copy was contained in or annexed to the policies.

It is not contended that the statute is merely directory, in the sense that it only commands the insurer to insert in or attach to the policy a correct copy, and leaves the rights of the parties otherwise unaffected. The answer to such a contention would be found in the language of the section which explicitly provides that, unless the correct copy is so inserted or attached, the application shall not be received in evidence or considered a part of the policy or of the contract.

The defendant contends that, by accepting the policy with what purported to be a copy of the application annexed to it, paying the premium which was payable before its delivery and the premium payable in the following August, and retaining and bringing suit upon the policy as it was written, without making objection to the inaccuracy of the copy actually annexed, the insured and his beneficiary have waived all objections to the copy, and assented to the copy as it was, so that the plaintiff is now estopped from raising the question of discrepancy.

One difficulty with this contention is that it does not appear that the insured or his beneficiary had knowledge that the copy was not correct. The documents which constituted the application were not in their custody, but in that of the defendant,

and they might well rely upon the defendant's assertion that a copy of the application was in fact annexed. Another difficulty is that the defendant in no way changed its position for the worse, relying upon the acceptance and retention of the policy as it was delivered. There is no occasion to consider what would have been the situation if the defendant had made inquiry, and had received an assurance from the insured that the copy was correct, or had requested to be allowed to correct any discrepancies. In bringing suit upon the policy the plaintiff made no explicit or implied affirmance of the contract as it purported to be made with the application as a part of it, rather than as it actually was under the operation of the statute. We find nothing which should be considered as a waiver, or should estop the plaintiff, and it is not necessary to consider whether there are considerations of public policy which under different circumstances might require us to hold that the effect of the statute could not be waived by the contracting parties.

The consideration of the question whether the finding that the copy annexed to the policy was not a correct copy as required by law, and the ruling that for that reason the application was not admissible in evidence, were right, requires us to construe the expression "correct copy" contained in the statute. It is to be noticed that the purpose of the section is not alone to declare what construction shall be placed upon the contract, but also to impose upon corporations and their officers a positive duty in respect to the issuing of policies containing any reference to the application, or where the application has any bearing upon the contract. In other words, the section is a regulation under a penalty of the manner in which those who write assessment insurance shall write their contracts, as well as a rule for determining the construction to be given to such contracts.

Neither aspect of the section requires us to hold that the copy must be exactly and literally correct in order to be a compliance with the law. Mere clerical errors which do not affect or alter the sense of the document, and cannot vary or alter the rights or obligations of the parties in any possible event, or in any way tend to mislead or prejudice any one, are not matters to which,

in either of its aspects, the statute is directed, and such clerical errors do not prevent a copy in which they may be found from being a correct copy within the meaning of the law. On the other hand, it cannot reasonably be held that no errors of substance will render the copy incorrect within the meaning of the law, unless they are in themselves material to the questions on trial in the action in which it is in dispute whether by reason of the incorrectness of the copy the application is admissible in evidence, or to be considered part of the contract. The law is not complied with if there are errors of substance in the copy, and when the law is not complied with the explicit command is that the application shall not be received as evidence, and shall not be considered a part of the policy or of the contract. If this seems a harsh provision, and one which may be used by the insured as a weapon with which to do wrong rather than as a shield to protect himself from wrong, it is yet a necessary construction, which we cannot refuse to make without interfering with the province of the Legislature. A copy which differs in substance from the original cannot be a correct copy in the common acceptance of terms, and the double purpose of this statute precludes us from seeking to find for the language used a meaning different from its ordinary sense. If in any case an insurer suffers from having unintentionally annexed a copy which is not correct, it is because, having the means of annexing a correct copy, and so being able to rely upon defences open to a contract of which the application is a part, he breaks the law by annexing an incorrect copy, or no copy at all, and is thereby precluded from defences founded upon the application.

In the present case the discrepancies between the application and the copy annexed to the policy were in part merely clerical and of no consequence, and in part matters of substance. It is not essential to specify them all. The omission of the heading "Application for Assurance in the Greenfield Life Association of Greenfield, Massachusetts," we consider immaterial, as the heading was no part of the application itself, which states explicitly on the body of the instrument that it was made to the defendant. The heading, like the filing printed on the other side of the same piece of paper, was merely something printed for convenience on the same paper with the application,

but not a part of it. If the heading had been referred to in the body of the application, or if its presence was the only means appearing on the paper of determining to whom the application was made, it might be a material part of the application. So too the statements of the medical examiner, which follow the signature of the applicant to that part of the application headed "Medical Examiner's Report," are merely a report to the insurer by one of its own officers upon the application as made and signed by the insured, and are not a part of the application within the meaning of the law, the language of which is "a correct copy of the application as signed by the applicant." The applicant signed twice, once upon each of two separate pieces of paper, and when his signatures were made the blanks on which the medical examiner afterwards made out a statement of the result of his personal examination were unfilled, and that statement was not part of the application "as signed by the applicant." For this reason, the omission of that statement did not make the copy incorrect. Nor do we consider the heading of the medical examiner's report a part of the application, and we think the partial omission of the heading of no importance.

Such discrepancies as the omission of the preposition "in" before the words "Fall River," in answering as to the applicant's place of residence, the misspelling of "temperate" as "temparate," the omission of the word "got" from the answer, "got cold four years ago during two days, no bad effects remaining," and of the preposition "for" in copying the answer "for cold," to the question for what the applicant last consulted a physician, the substitution of "or" for "and" in the phrase "so far as you know and believe," and the omission of "got" and "the" in copying the answer "got hurt in the mine," are all merely clerical, not affecting the meaning of the application, and not preventing the copy in which they appear from being a correct copy within the meaning of the statute.

Whether the omission of the name of the county in copying the applicant's statement of his place of birth can be held a mere clerical error, and whether several of the other discrepancies are such as to prevent the copy from being correct within the meaning of the law, we do not stop to decide, as there are

discrepancies which are plainly matters of substance, which might in circumstances easily conceivable affect the rights of the parties, and which in our opinion required the presiding justice to find that the copy was not a correct copy as required by law, and to refuse to admit the original in evidence. These discrepancies were the incorrect answer given in the copy to the question as to the amount in which the applicant's life was then insured, the answer in the application being \$100 and in the copy \$1,000, and the erroneous insertion of the answer "No" to the question, "Has any member of your father's family died of an inherited disease?" which was left unanswered in the original application. An omission to answer is not of course, or ordinarily, a negative answer, and merely founds a waiver of the answer by the insurer. *Hall v. People's Ins. Co.* 6 Gray, 185, 191. *Liberty Hall Association v. Housatonic Ins. Co.* 7 Gray, 261. The amount of previous insurance, and the presence or absence of inherited disease in the family of the applicant, are deemed important by insurers, and an untrue statement in respect of either might well be the occasion of future controversy as to the insurance written upon the strength of such a statement.

The application being inadmissible in evidence and no part of the policy or contract, it necessarily followed that the defendant could not be allowed to put in any evidence tending to show that the insured made false statements in his application, including those made by him to the medical examiner. Such evidence could not be admitted without disobeying the law which says that those statements shall not be considered a part of the contract. *Considine v. Metropolitan Ins. Co.* 165 Mass. 462, 466. See *Bardwell v. Conway Ins. Co.* 122 Mass. 90.

The policy sued on was issued on July 7, 1896, and it failed to comply with the provisions of St. 1896, c. 515, § 1, requiring the words "Assessment Plan" to be printed in bold type upon both the policy and the application. The defendant now contends that this statute is merely directory. As no question as to that statute appears to have been raised at the trial, and it does not appear to have had any part in the decisions there arrived at, we have now no occasion to consider its meaning or effect.

None of the rulings to which the defendant excepted being wrong, by the terms of the report the verdict is to stand, and judgment is to be entered thereon for the plaintiff.

So ordered.

EDWARD S. WATERS & others vs. PIERRE BONVOULOIR.

Hampden. September 27, 1898. — January 4, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Appropriation of City Money from Contingent Fund for Unauthorized Purpose — Injunction.

The appropriation of money made on the recommendation of the mayor of the city of Holyoke by the board of aldermen from the contingent fund to defray the expenses of a committee composed of the mayor and certain members of the board of aldermen to attend a convention of American municipalities in another State, where subjects pertaining to the administration of cities are to be discussed and which the city of Holyoke has received an invitation to attend, is authorized neither by the general laws nor by the charter of the city; and the city treasurer may be enjoined from the payment of the money.

PETITION IN EQUITY, filed June 8, 1898, by ten taxable inhabitants of the city of Holyoke, to restrain the city treasurer from the payment from the city treasury of any money called for by the following order of the board of aldermen, passed on June 7, 1898: "Ordered that a committee of five, including the president of the board of aldermen, be authorized to attend the Convention of American Municipalities at Detroit, said committee to be appointed by the president, and the expense to be paid from the contingent account. Voted to include the mayor on the above committee." Hearing before *Knowlton, J.*, who was of opinion that the injunction ought to be issued, as prayed for, but, at the request of the defendant, reported the case for the consideration of the full court.

J. B. Carroll, for the defendant.

A. B. Chapin, for the plaintiffs.

FIELD, C. J. This is a petition brought under Pub. Sts. c. 27, § 129, by ten taxable inhabitants of the city of Holyoke to restrain the defendant as city treasurer from paying money out

of the treasury of the city in accordance with an appropriation of five hundred dollars, made on the recommendation of the mayor by the board of aldermen, by a vote of 16 yeas to 5 nays. The appropriation was from the contingent fund to defray the expenses of a committee consisting of the mayor and four aldermen in attending a convention of American Municipalities at Detroit, Michigan, where subjects pertaining to the administration of cities were to be discussed, and which the city of Holyoke had received an invitation to attend. This convention was under the charge of the League of American Municipalities, whose constitution provided that its objects were: "First, the perpetuation of the organization as an agency for the co-operation of American cities in the practical study of all questions pertaining to municipal administration; secondly, the holding of annual conventions for the discussion of contemporaneous municipal affairs; thirdly, the establishment and maintenance of a central bureau of information for the collection, compilation, and dissemination of statistics, reports, and all kinds of information relative to municipal government."

The charter of Holyoke is St. 1896, c. 438, the last part of § 13 of that chapter is as follows: "The board [of aldermen] shall, so far as is not inconsistent with this act, have and exercise all the legislative powers of towns and of the inhabitants thereof, and shall have and exercise all the powers now vested by law in the city of Holyoke and in the inhabitants thereof, as a municipal corporation, and be subject to all the liabilities of city councils, and of either branch thereof, under the general laws of the Commonwealth, and it may by ordinance prescribe the manner in which such powers shall be exercised. Its members shall receive no compensation for their services as members of the board of aldermen, or of any committee thereof." Section 14 is as follows: "Neither the board of aldermen nor any member or committee thereof shall directly or indirectly take part in the employment of labor, the making of contracts, the purchasing of materials or supplies, the construction, alteration, or repairs of any public works, buildings, or other property, or the care, custody, or management of the same; or in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except as herein

otherwise provided and except such as may be necessary for the contingent and incidental expenses of the board of aldermen ; nor in the appointment or removal of any officers except as is herein otherwise provided. But nothing in this section contained shall affect the powers or duties of the board in relation to city aid to disabled soldiers and sailors and to the families of those killed in the civil war." Section 23 is as follows : "No member of the board of aldermen shall, during the term for which he is elected, hold any other office in or under the city government, have the expenditure of any money appropriated by the board of aldermen, or act as counsel in any matter before the board of aldermen or any committee thereof ; and no person shall be eligible for appointment to any municipal office established by the board of aldermen during any municipal year within which he was an alderman, until the expiration of the succeeding municipal year."

The question is whether the appropriation of five hundred dollars from the contingent fund to pay the expenses of the committee to the convention of the American Municipalities at Detroit, is authorized by the general laws with reference to towns and cities, or by the charter of the city of Holyoke. Pub. Sts. cc. 27 and 28, and the amendments thereof, define the powers of towns and cities, and city councils. The appropriation shown in the present case is not for the payment of "necessary charges" within the meaning of Pub. Sts. c. 27, § 10. Necessary charges are confined to matters in which a town or city has a duty to perform, an interest to protect, or a right to defend. *Minot v. West Roxbury*, 112 Mass. 1. *Coolidge v. Brookline*, 114 Mass. 592. *Spaulding v. Peabody*, 153 Mass. 129. *Swift v. Falmouth*, 167 Mass. 115.

Pub. Sts. c. 28, § 13, is as follows : "The city council of a city may, by a yea and nay vote of two thirds of the members of each branch thereof present and voting, appropriate money, not exceeding in any one year one fiftieth of one per cent of its valuation for the current year, for armories for the use of military companies, for the celebration of holidays, and for other public purposes." It is contended that the appropriation shown in the present case is for "other public purposes," within the meaning of this section of the statutes. The appointment of a committee

"to represent the city of Holyoke at the Convention of American Municipalities to be held at Detroit, Mich., from August 1st to 4th, inclusive," does not seem to be for any distinct public purpose within the meaning of the charter of the city or of the general laws. The purpose apparently is to educate the committee generally with reference to all questions pertaining to municipal administration anywhere. It is not confined to the ascertainment of facts for the information of the board of aldermen of the city of Holyoke concerning questions actually pending before the board. There is nothing in the statutes of the Commonwealth which authorizes the city of Holyoke to become a member of the League of American Municipalities, and the attendance of a committee made up of the mayor and certain members of the board of aldermen upon any meeting of that League is for the purpose of listening to or taking part in general discussions concerning municipal administration. The general education of the mayor and aldermen upon all matters relating to municipalities in the United States and Canada is not, we think, a public purpose, and cannot be paid for out of the funds of the city. An injunction should be issued as prayed for.

So ordered.

MARTHA A. S. FORBES vs. COMMONWEALTH.

Worcester. October 5, 1898. — January 4, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Land Damages — Mill — Easement — Merger.

In general, an easement acquired by reservation or grant of a right to raise the water of a stream to a certain height appurtenant to a mill privilege is appurtenant to every part of such privilege.

If the right to flow land is created by reservation and by grant to a mill corporation, its successors and assigns forever, with no limitation that the right to raise the water to the height mentioned shall be confined to any particular use of the water, an easement appurtenant to the mill privilege of the corporation is created, and will not be destroyed by taking down the dam and erecting a new one in its place, or by erecting a new dam across the stream above the old dam, on land which was a part of such mill privilege and which is conveyed, with its appurtenances, by the corporation to the Commonwealth, pursuant to St. 1895,

c. 488; and if the Commonwealth, under that statute, subsequently takes the servient land in fee, the land is to be treated as subject to the easement in assessing the damages.

PETITION to the Superior Court for an assessment of the damages occasioned by the taking of the petitioner's land in Clinton by the Metropolitan Water Board, under St. 1895, c. 488. Trial, without a jury, before *Gaskill, J.*, who found for the petitioner, and, with the consent of the parties, reported the case for the determination of this court. If there was no error in any of the rulings, judgment was to be entered on the finding; otherwise, judgment was to be entered for the petitioner, in the sum of \$3,500, — or of \$2,200, — as law and justice required. The facts appear in the opinion.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

H. Parker, (*C. Bullock* with him,) for the petitioner.

FIELD, C. J. The petitioner's title to the land taken by the Metropolitan Water Board, in pursuance of St. 1895, c. 488, was derived through mesne conveyances from the Lancaster Mills, a corporation engaged in the business of manufacturing cotton cloth by means of mills and a dam on the south branch of the Nashua River. The deed of the Lancaster Mills to Franklin Forbes, the petitioner's predecessor in title, contained this reservation: "Reserving to the said Lancaster Mills, their successors and assigns, the right to raise and maintain forever their dam, by flashboards or otherwise, three feet above its present height, without being subject to any claim or demand from said grantee, his heirs or assigns, for damages to said Barnard Farm, or to said Upper Intervale by reason thereof." Afterwards, and while he held the title, Franklin Forbes, by deed dated March 31, 1868, conveyed to said Lancaster Mills, its successors and assigns, the right to flow said land "by back water from the dam of said corporation raised and maintained forever, by permanent structure or otherwise, one foot above the present permanent height thereof." The report of the case by the justice of the Superior Court then proceeds as follows:

"It was agreed that the said dam of the Lancaster Mills maintained at the height referred to in these deeds would and did flow the said petitioner's land, taken as aforesaid, up to the

flowage line designated upon the accompanying plan referred to, annexed hereto, marked 'Exhibit B.'

"On the 15th day of May, 1897, the Metropolitan Water Board, acting for the Commonwealth of Massachusetts, under authority of chapter 488 of the Acts of 1895, and in pursuance of the construction of the system of Metropolitan Water Works provided for by said act, entered into an agreement with said Lancaster Mills, whereby said board was authorized on and after June 1st, 1897, to take down the upper portion of said Lancaster Mills dam, not exceeding six feet below the top of flashboards; to lower the water in the mill-pond by means of taking down the upper portion of the dam as aforesaid; to erect a temporary dam at a point further up the stream, and during the time the water was drawn off the mill-pond to supply the mills of said corporation with water, through a pipe running from the temporary dam to the mills; and when the purposes for which said mill-pond was so emptied, namely, the construction of the dam for the reservoir of the Metropolitan Water Works, were accomplished, to rebuild said mill-dam, in accordance with § 9 of said chapter 488 of the Acts of 1895. . . .

"About the 1st day of July, 1897, the servants of the Commonwealth, under the terms of said agreement with the Lancaster Mills, entered upon land of said Lancaster Mills, and began taking down the dam, as by said agreement authorized.

"On the 21st day of July, 1897, said dam had been taken down to a depth of five feet; on the 28th day of August, said dam had been so far destroyed and obliterated as to draw off the water of the former mill-pond or reservoir of said Lancaster Mills, and the waters have since flowed within the original channel of the river, no part of petitioner's land being flowed.

"The further prosecution of the works of said Metropolitan Water Board, under the provisions of said act, require the construction of a permanent dam for a reservoir of the Metropolitan Water Works, at a point above the original dam of said Lancaster Mills, referred to in said Forbes deed, and within the limits of the former mill-pond. Said dam, so to be constructed, will be situate above said Lancaster Mills dam, and below said lands of the petitioner. When said dam is so constructed, the lands of the petitioner will be wholly within the basin and

reservoir for water caused by said dam so to be constructed for the Metropolitan Water Works ; so that the entire flowage of petitioner's lands will be from the said dam so to be constructed, and not at all from said original dam when or if reconstructed.

" On the 21st day of July, 1897, the Lancaster Mills conveyed to the Commonwealth a parcel of land covered in part by the former mill-pond of said Lancaster Mills, which tract of land is situate within the former limits of said Lancaster Mill-pond, and between the dam of said Lancaster Mills and the petitioner's land, etc.

" The Lancaster Mills also conveyed to the Commonwealth 'all the mill privileges in said Clinton, owned by said grantor corporation, and situate on said southerly branch of the Nashua River, south of the northerly boundary line of the above described parcel and its tributaries entering said river south of said northerly boundary line ; and all right, title, and interest in the fee of land in Clinton under said Nashua River and situate southerly of said northerly boundary line, and under its tributaries entering said river south of said northerly boundary line, and all flowage rights south of said northerly boundary line.' The right of flowage on petitioner's lands, formerly held by Lancaster Mills, being included in the terms and description of said conveyance. . . .

" On the 23d day of September, 1897, the Commonwealth, under the provisions of said chapter 488, made a taking of the said petitioner's lands, the title to which, it was agreed, was then in the petitioner, Martha A. S. Forbes, subject only to flowage rights hereinabove referred to, if any, the petitioner contending that no such flowage rights existed when lands were taken as aforesaid.

" Upon the foregoing facts, the petitioner asked the court to rule that her land, when taken by the Commonwealth, was subject to no flowage rights ; and asked the court to rule that the rights of flowage formerly held by the Lancaster Mills had been and were extinguished and abandoned before the said taking of the petitioner's lands ; and further asked the court to rule that by the said taking by the said Commonwealth the said easements were *eo instanti* extinguished.

" It was agreed between the parties that, if said contention of

petitioner were sustained, damages were to be assessed for the petitioner in the sum of \$3,500; if not sustained, then for \$2,200."

The justice assessed damages in the sum of \$2,200, and then reported the case to this court.

It thus appears that the right to flow the lands of the petitioner was created by reservation and by grant, and that the reservation and the grant were to the Lancaster Mills, its successors and assigns forever. There is no limitation in the reservation or the grant that the right to raise the water to the height mentioned should be confined to any particular use of the water. The charter and the title of the Lancaster Mills to the mill privilege are not set out, but it is, we think, to be assumed that it held its mill privilege with its appurtenances in fee simple, and had the power to convey it in whole or in part in fee simple, with its appurtenances, to any grantee. This reservation and this grant of the right to flow the petitioner's land, we think, created an easement appurtenant to the mill privilege of the Lancaster Mills. The height to which the right to flow extended was measured by reference to the permanent height of the existing dam of the Lancaster Mills. But the easement would not be destroyed by taking down the dam and erecting a new one in its place, or by erecting a new dam across the stream above the old dam on land which was a part of the mill privilege of the Lancaster Mills to which the easement of the right to flow was appurtenant. A right of way appurtenant to land usually is appurtenant to every part of the land when divided into parcels, and in general an easement acquired by reservation or grant of a right to raise the water of a stream to a certain height appurtenant to a mill privilege is appurtenant to every part of the mill privilege. The erection of a new dam on the mill privilege of the Lancaster Mills, whether above or below the old dam, if it raised the water of the stream no higher than the right granted, would work no injury to the petitioner. *Cary v. Daniels*, 8 Met. 466, 483. *Clinton Gas Light Co. v. Fuller*, 170 Mass. 82. See *Chase v. Sutton Manuf. Co.* 4 Cush. 152, 171; *Stackpole v. Curtis*, 32 Maine, 383; Gould, Waters, (2d ed.) § 344.

If the Metropolitan Water Board had taken by the same tak-

ing the whole mill privilege of the Lancaster Mills and the land of the petitioner, the value of the mill privilege would have been enhanced by the value of the easement appurtenant to it, and the value of the petitioner's land would have been diminished by the value of the easement to which the land was subject. But the rights of the petitioner are not affected by the fact that the board acquired a part of the mill privilege with its appurtenances, by purchase pursuant to St. 1895, c. 488, § 4. Afterwards the petitioner's land was taken, as we understand, in fee. There was no merger of the title to the land with its appurtenances which had been purchased of the Lancaster Mills by the board in the name of the Commonwealth with the title to the land of the petitioner, which was taken by the board in the name of the Commonwealth, until after the taking of the petitioner's land. The merger of title, if there was a merger, was a consequence of the taking. Up to and at the time of the taking the petitioner's land was subject to the easement appurtenant to the mill privilege of the Lancaster Mills, a part of which had been conveyed to the Commonwealth.

According to the terms of the report, judgment is to be entered on the finding. *So ordered.*



TELEGRAM NEWSPAPER COMPANY *vs.* COMMONWEALTH.
GAZETTE COMPANY *vs.* SAME.

Worcester. October 7, 1898. — January 4, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Corporation — Criminal Contempt — Proceedings for Contempt on Court's own Motion — Publications in Newspaper — Imposition of Fine on Corporation — Execution.

A corporation may be held liable for a criminal contempt in publishing an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial.

When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the

court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion can institute proceedings for contempt.

It may be rightly adjudged a contempt of court for a newspaper to publish statements of facts, evidence of which was not competent at the trial of a cause and was not introduced at the trial thereof, if they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and their natural and probable effect was improperly to influence the court and jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation for contempt is by levy of an execution, to be issued by the court.

FIELD, C. J. These are two writs of error, and, although the pleadings may possibly raise issues of fact as well as issues of law, the cases were entered without objection on the part of any of the parties upon the docket of the full court, and each case was heard upon the plea *in nullo est erratum*. The Telegram Newspaper Company is a Massachusetts corporation, having its usual place of business in Worcester and publishing there a daily newspaper. The Gazette Company is a corporation established under the laws of the State of Maine, having its usual place of business in Worcester, and publishing there a daily newspaper. It is understood that it had complied with St. 1884, c. 330, and had made the commissioner of corporations its attorney, upon whom legal process might be served. The record in the cases recites that the corporations respectively appeared in the Superior Court, with counsel, in obedience to the summons of that court to show cause why they should not be adjudged in contempt for publishing certain articles in their newspapers of the dates of January 13 and 14 respectively of the year 1898, which articles dealt with and discussed the matter of the trial before said court of the action or petition of Silas H. Loring against the town of Holden, and that the corporations appeared and were heard, so that any question of due service of the summons upon the foreign corporation has become immaterial.

At the time of the publication of the articles in the newspapers, the petition of Silas H. Loring against the town of Holden was on trial before the Superior Court sitting at Worcester, and it was for the assessment of damages suffered by the taking of land of the petitioner for the abolition of a grade crossing of the Fitchburg Railroad Company. The portion of the articles

published which the court found was calculated to obstruct the course of justice in said court and prevent a fair trial of said petition was, after describing the petition of Loring against the town of Holden, the following: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law," which appeared in the Worcester Daily Telegram; and "The town offered the plaintiff \$80, but he wanted \$250," which appeared in the Worcester Evening Gazette. Whether there is any truth in these statements does not appear. The facts stated, even if they were true, were not admissible in evidence at the trial of the petition before the Superior Court, and so far as appears they were no part of the proceedings at the trial, and, if they were brought to the knowledge of the jurors before they rendered their verdict, were calculated to influence them upon the amount of the damages to be given by their verdict. The newspapers were published and circulated in Worcester, and it was not improbable at the time of publication that the articles would be read by some of the jurors before the trial of the petition was finished.

The record before us, in each case, after setting out the whole of the articles published, and the summons, service, and appearance of the corporation and the hearing, concludes as follows: "When, after hearing all matters and things concerning said publication by said respondents, it appearing to said court that said article was calculated to obstruct the course of justice in said court and prevent a fair trial of said case, and that it was a contempt of said court for said corporation to publish the said article during the said trial, it was therefore ordered by said court that said respondent corporation be adjudged guilty of contempt of said court for said publication of said article, and it was thereupon ordered by said court that said respondent corporation pay a fine of \$100, and it was further ordered that, if said fine be not paid within twenty-four hours, an execution be issued against said respondent corporation for the collection of said fine by a levy on its property."

It is contended that a corporation cannot be guilty of a criminal contempt of court although it may be fined for what is called a civil contempt. It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in

this Commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution. *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513. *Reed v. Home Savings Bank*, 130 Mass. 443. We think that a corporation may be liable criminally for certain offences of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong. In most of the States of this country corporations may be formed under general laws for the purpose of doing almost any kind of business as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet if the corporation cannot be punished by a fine it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libellous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this Commonwealth. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339. See *The Queen v. Great North of England Railway*, 9 Q. B. 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729; *S. C.* 31 Am. Rep. 663, and note. *Brennan v. Tracy*, 2 Mo. App. 540. *Pharmaceutical Society v. London & Provincial Supply Association*, 5 App. Cas. 857, 869, 870. 2 Bish. New Crim. Law, § 935. Newell, Slander & Libel, (2d ed.) 362, 363. Odgers, Libel & Slander, (3d ed.) 436. Thompson, Corp. §§ 6418 *et seq.*

The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause. *O'Shea v. O'Shea*, 15 P. D. 59. *Ex parte Green*, 7 Times Law Rep. 411. *Daw v. Eley*, L. R. 7 Eq. 49, 55. *Rama*

botham v. Senior, L. R. 8 Eq. 575. *People v. Wilson*, 64 Ill. 195. *In re Sturoc*, 48 N. H. 428. *In re Cheeseman*, 10 Vroom, 115, 137. *State v. Frew*, 24 W. Va. 416. *Oswald*, Contempt of Court, (2d ed.) 58 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 59. If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt. *Thompson, Corp.* §§ 6448 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 847, and cases cited.

There are no statutes in this Commonwealth regulating the proceedings in the trial and punishment of contempt of court. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the Twelfth Article of our Declaration of Rights." *Cartwright's case*, 114 Mass. 230, 238. See *Tinsley v. Anderson*, 171 U. S. 101.

In the present cases it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court. The proceedings in the present

cases after the service of process show that the plaintiffs in error were specifically informed of the nature of the charge against them, and were given a full opportunity to be heard with the aid of counsel.

The most important question is whether the publication of these articles under the circumstances stated could be adjudged a contempt. The articles published were not defamatory, either as regards the presiding justice of the court or the jurors before whom the cause referred to was being tried, or the parties to the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable, although this does not expressly appear in the papers before us, that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles and caused them to be published. The Superior Court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody. The articles are objectionable only because they purport to state the amount of money which the town offered to pay the plaintiff, and the amount the plaintiff demanded before the petition was brought. The law encourages attempts to settle or compromise disputes without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation. *Upton v. South Reading Branch Railroad*, 8 Cush. 600. *Harrington v. Lincoln*, 4 Gray, 563. *Gay v. Bates*, 99 Mass. 263. *Draper v. Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporations is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Metropolitan Music Hall Co. v. Lake*, 58 L. J. (N. S.) Ch. 518, it is said that it must be shown that the articles were published with knowledge of the pending cause, and that appears in the present cases.

In *Cartwright's case*, *ubi supra*, it is said by the court: "But the jurisdiction and power of the court do not depend upon the question whether the offence might or might not be punished by indictment. . . . 'As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done.' By Taney, C. J., in *Wartman v. Wartman*, Taney, 362, 370." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the Superior Court should find that the articles published actually had been read by some of the jurors while trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the court room, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible as evidence.

We cannot say that it appears that the Superior Court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court, and it was for that court to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial and was not introduced at the trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation is by a levy of an execution issued by the court. *The King v. Woolf*, 2 B. & Ald. 609; *S. C.* 1 Chitty, 583. *Huddleson v. Ruffin*, 6 Ohio St. 604. 1 Chitty, Crim. Law, (2d ed.) 811. 1 Bish. New Crim. Proc. §§ 1303 *et seq.*

Judgments affirmed.

F. P. Goulding, (*W. C. Mellish* with him,) for the plaintiffs in error.

H. Parker, District Attorney, (*G. S. Taft*, Assistant District Attorney with him,) for the Commonwealth.

C. E. VANDERCOOK *vs.* PATRICK J. O'CONNOR & another.

Hampden. November 14, 1898. — January 4, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Conversion — Partnership — Sufficiency of Evidence — Qualification of Expert — Exceptions — Mortgage.

Where an exception to a refusal to direct a verdict for the defendants is put on the ground, which appears to be an afterthought, that the evidence that they were partners was insufficient, slight evidence to that effect uncontroverted will be deemed sufficient.

At the trial of an action for the conversion of certain bottles, a witness testified to the market value thereof at the time of a conditional sale in question in H. He had been in the bottling business over thirty years, and in H. eleven years, and he testified that he knew the market value of bottlers' supplies in H. at the time. He bought these very bottles with his own name blown in them, and previously had often bought bottles with other men's names blown in them. *Held*, that it could not be said that the experience of the witness showed that the judge exercised his discretion wrongly in admitting the evidence.

It is a sufficient answer to an exception to the exclusion of evidence that the date of a mortgage of personal property had been changed after recording so as to show, contrary to the fact, that it was recorded in time and was valid, that there was no evidence that the mortgage covered the merchandise in question, and that there was express evidence that it did not cover it.

TORT, for the conversion of twenty-seven gross of bottles. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

A. L. Green, for the defendants.

N. P. Avery, for the plaintiff.

HOLMES, J. This is an action for the conversion of twenty-seven gross of bottles, and the case is here on exceptions. The first exception is to a refusal to direct a verdict for the defendants. There was evidence that the plaintiff had sold the bottles to one Esther J. Winn upon condition that the title should not pass until the bottles were paid for, and that they had not been paid for. Mrs. Winn sold out her business to the defendants, and the defendants converted the bottles. This exception is not much pressed. It is put on the ground that the evidence that the defendants were partners, that is, we suppose, that they were jointly liable for the tort, was insufficient. As this objection to all appearance is an afterthought, and as there is no indication of any question having been made upon the point at the trial, slight evidence uncontroverted will be deemed sufficient here. The sale was to P. J. O'Connor and Company. Mrs. Winn's husband, who remained in the defendants' employment as their foreman, testified to the bottles having been used by the defendants in their business as required. Under the circumstances, at least, this is enough.

Another exception, also not much pressed, was taken to the admission of the testimony of the same witness to the market value of these bottles at the time of the conditional sale in Holyoke. He had been in the bottling business over thirty years, and in Holyoke eleven years, and testified that he knew the market value of bottlers' supplies in Holyoke at this time. He bought these very bottles with his own name blown in them, and previously, it would seem often, had bought bottles with other men's names blown in them. If we assume what is not expressly stated, and take it that we have all the evidence of the witness's experience before us, we cannot say that it shows that the judge exercised his discretion wrongly in admitting the evidence.

On cross-examination of the plaintiff, it was brought out that he had taken a mortgage of certain goods from Mrs. Winn before the date of her sale to the defendants, and after the plaintiff's alleged conditional sale of these bottles to her. The defendants offered to prove that the date of the mortgage had been changed

after recording, so as to show, contrary to the fact, that it was recorded in time and was valid. This evidence was excluded. It is urged that it should have been admitted, on the ground that the fact of time throws light upon the alleged conditional sale, and strengthens the defendants' argument from various circumstances not necessary to be stated that the document purporting to make the conditional sale was fictitious, and was got up after the mortgage was discovered to be invalid. The short answer to this exception is that there was no evidence that the mortgage covered the bottles in question, and there was express evidence that it did not cover them, in which case the whole argument falls to the ground. *Exceptions overruled.*

DENNIE L. FARR vs. SAMUEL ROUILLARD.

Hampden. December 14, 1898. — January 4, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Bond of Constable good at Common Law — Breach — Action — Answer signed by Attorney in former Action not admissible in Evidence.

A bond given by a constable in a city other than Boston to the treasurer thereof is, if it was voluntarily executed and contains nothing in the condition contrary to law, a valid bond at common law.

Where it is plain that the obligor in a common law bond given by a constable in a city other than Boston to the treasurer thereof intended to comply with the statute, and therefore, by implication, it was taken in trust for the benefit of the same persons who could take advantage of a bond in the statutory form, the damages will be measured by the interest of the *cestui que trust*, not by that of the obligee.

The answer, signed by attorney in an action against a constable for the conversion of goods, is not admissible in evidence in a subsequent action, brought for the benefit of the same plaintiff against a surety upon the constable's bond, to enforce payment of the judgment recovered in the former action.

CONTRACT, in the name of the treasurer of the city of Holyoke, for the benefit of Mary Brady, upon a constable's bond given by Fred S. Williams as principal, and by the defendant and two others as sureties, to enforce payment of a judgment

recovered by Brady in an action against Williams for the conversion of certain goods.

Trial in the Superior Court, without a jury, before *Maynard, J.*, who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

A. L. Green & F. F. Bennett, for the defendant.

R. O. Dwight, for the plaintiff.

LATHROP, J. The principal question in this case is whether the action can be maintained upon the bond, as the obligee mentioned therein is "the treasurer of the city of Holyoke," instead of the city of Holyoke. The bond in question was accepted by the board of aldermen of Holyoke, and the form was approved by the city solicitor. By the Pub. Sts. c. 27, § 113, provision is made for a constable giving a bond "to the inhabitants of the town," and the section ends with the words, "and no constable shall serve any process in a civil action until he gives such bond." By c. 28, § 2, chapter 27 and all other laws relating to towns shall apply to cities so far as they are not inconsistent with the general or special provisions relating thereto. By § 9 of this chapter it is provided, "Constables' bonds in the city of Boston shall run to the city treasurer." The fair inference from these provisions is that a bond given by a constable in a city other than Boston should run to the city, and not to the treasurer.

The defendant contends that, as the bond ran to the treasurer and not to the city, it is void, and relies upon the case of *Whitney v. Blanchard*, 2 Gray, 208. This was an action of tort against a constable of a town for neglecting to serve and return a writ sued out by the plaintiff and committed to the defendant for service. The constable had given no bond, and this was held to be a good defence, on the ground that he could not be held liable in damages for omitting to do that which he could not legally do. This case has no bearing on the one before us.

A case more nearly resembling the present is *Sweetser v. Hay*, 2 Gray, 49, where a bond was given by a town treasurer and collector to the selectmen of a town instead of to the town, as required by statute; and it was held that this was a valid bond at common law, and that the selectmen might maintain an action upon it for the benefit of the town. See also *Woodward*

v. *Pickett*, 8 Gray, 617; *Grocers' Bank v. Kingman*, 16 Gray, 473; *Miner v. Coburn*, 4 Allen, 136; *Brighton Bank v. Smith*, 5 Allen, 413; *Holbrook v. Klenert*, 113 Mass. 268; *Mosher v. Murphy*, 121 Mass. 276; *Brooks v. Whitmore*, 139 Mass. 356.

The bond in suit was voluntarily executed, there is nothing in the condition thereof contrary to law, and it is a valid bond at common law.

Treating the bond as a common law bond, it is contended by the defendant that only nominal damages can be recovered; but it is plain that the obligor intended to comply with the statute, and therefore, by implication, it was taken in trust for the benefit of the same persons who could take advantage of a bond in the statutory form. The damages, therefore, will be measured by the interest of the *cestui que trust*, not by that of the obligee. *Sweetser v. Hay*, 2 Gray, 49. See also *Drummond v. Crane*, 159 Mass. 577, 580; *Lloyd's v. Harper*, 16 Ch. D. 290.

The plaintiff was allowed to put in evidence, against the defendant's exception, the record in the action of Mary Brady against Fred S. Williams. This appears by the declaration to have been an action of tort for the conversion of certain personal property. The answer is a general denial, and contains the following: "And the defendant further answering says that he is a constable of the city of Holyoke; that as to the property alleged to be converted, as much thereof as he may have taken into his possession he took as a constable of the city of Holyoke, and by virtue of a certain writ in which the plaintiff in this action was the defendant." This answer is signed by an attorney. The record further showed that the plaintiff recovered judgment.

The difficulty with the plaintiff's case in this respect is, that, unless the statement in the answer is admissible in evidence against the defendant, there is nothing to show that his tortious act was in the performance of his duty as constable, and therefore a breach of his bond. If this answer had been signed by him it would, without doubt, have been admissible, but it was signed merely by his attorney, and there was nothing to indicate how far the attorney was instructed by the defendant in this particular. This precise point was decided in *Dennie v. Williams*, 135 Mass. 28.

The plaintiff seems to have relied entirely upon this statement in the answer, for we find no other evidence to show that the tortious act of Williams was done *colore officii*. As the statement in the answer was not admissible for this purpose, the entry must be,

Exceptions sustained.

WILLIAM T. FORBES, Judge of Probate, *vs.* CHARLES
E. WARE, administrator.

Worcester. October 4, 1898. — January 5, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Assessor — Master — Breach of Guardian's Bond — Set-off — Payment — Support and Maintenance of Minor Children — Contract — Evidence — Compound Interest.

In an action for the breach of a guardian's bond an assessor's report may be treated as in the nature of a master's report.

Even if it is assumed that the administrator of a ward's estate can bind it by an agreement with the guardian that it shall be liable to the guardian for the support and maintenance by her of the children left by the ward, yet the contention, in an action for the breach of the bond, that the amount so expended is to be treated as set-off and payment cannot avail, if there is nothing to show that any such agreement was entered into, either in the facts agreed to at the hearing before the master or in the evidence that was offered and excluded, and there is nothing from which such an agreement can be implied.

In an action against the administrator of a guardian for the breach of her bond, the fact that the husband of the ward had no property except such as he would receive from his wife's estate has no tendency to show that the guardian had a valid claim against the estate of the ward for the support and maintenance of the children of the ward after her death.

In an action against the administrator of a guardian for the breach of his bond the defendant cannot put in evidence in his own favor the declarations of his intestate.

Even if it is assumed, in an action for the breach of a guardian's bond, that evidence offered by the defendant should have been admitted, yet its exclusion does him no harm, if it falls far short of establishing his contention of a certain payment as a right to a set-off.

The fact that a guardian mingled the property of the ward's estate with his own, used it the same as his own, and neglected to pay it over, does not, in an action of contract for a breach of the bond, justify, without anything more appearing, the imposition of compound interest at the rate established by law in this Commonwealth for simple interest.

CONTRACT, for the benefit of Edward E. Webster and George J. Marsh, administrators of the estate of Mabel A. (Miles)

Webster, against Charles E. Ware, administrator with the will annexed of the estate of Mary J. Miles, upon a bond given by her to the Judge of Probate as the former guardian of said Mabel A., and approved on July 3, 1877. Mabel A., who was the wife of Edward E. Webster, died on July 2, 1885, and was then a minor, and the administrators of her estate were appointed on January 4, 1896. Mary J. Miles died on April 3, 1894, and the writ in the present case was dated May 8, 1896.

The case was referred to an assessor, and afterwards reserved by *Allen, J.* for the determination of the full court. The facts appear in the opinion.

W. S. B. Hopkins & C. A. Russell, for the plaintiff.

H. Parker, for the defendant.

MORTON, J. We treat the assessor's report as in the nature of a master's report. See *Fisk v. Gray*, 100 Mass. 191; *Pad-dock v. Commercial Ins. Co.* 104 Mass. 521; *McKim v. Blake*, 139 Mass. 598. Exceptions to it were taken by both parties. The plaintiff has not argued the first exception taken by him, and states, in effect, that he does not now insist upon the others. We therefore regard the plaintiff's exceptions as waived.

The substance of the defendant's exceptions is that the master erred in regard to the matter of set-off and payment, and in excluding evidence that was offered by the defendant in support of it, and also in computing interest at six per cent, with annual rests on the balance found due from the defendant's intestate to the estate of her ward.

The claim on which the defendant relies in set-off and payment did not arise till after the death of the intestate's ward, and is for the support and maintenance by the defendant's intestate of the children left by her former ward. If we assume that the administrators of the ward's estate could have bound it by an agreement with the defendant's intestate that the estate which they represented should be liable to her for such support and maintenance, — in regard to which there are great difficulties, — there is nothing tending to show that any such agreement was entered into, either in the facts agreed to at the hearing before the master, or in the evidence that was offered and excluded. Nor do we see anything from which such an agreement can be implied. All that appears is that,

after the mother's death, the grandmother took the children home with her and supported and cared for them till her death. In the summer they made visits at their father's home in Gloucester, and lived with their grandmother the rest of the time with his knowledge and consent. There is nothing to show that she expected payment for what she did. She was not the guardian of the children, or legally liable for their support. The father was their natural guardian, and was bound to maintain them. Nothing occurred, so far as appears, to relieve him from that obligation. The fact that he had no property except such as he would receive from his wife's estate had no tendency to show that the defendant's intestate had a valid claim against the estate of her former ward for the children's support and maintenance after the ward's death. We discover no ground on which it justly can be held that what the defendant's intestate did in supporting and maintaining the children operated as a payment in whole or in part of what was due from her to the estate of her ward, or should be so treated in equity and good conscience. The evidence which was offered by the defendant, as to what his intestate said respecting the terms and conditions under which the children were living with her, was rightly excluded. The defendant could not put in, as evidence in his own favor, the declarations of his intestate. Even if we assume that the other evidence which was offered by the defendant should have been admitted, its exclusion did the defendant no harm, as it fell far short of establishing a payment or a right to a set-off. We think that the rulings of the assessor on this part of the case were correct, and that the defendant's exceptions, so far as they relate to the matter of payment or set-off and evidence offered in support thereof, must be overruled. We have considered the questions on their merits without regard to certain technical objections which have been urged by the plaintiff.

The remaining question relates to the matter of interest. The assessor found that on December 10, 1887, there was a balance due from the defendant's intestate of \$10,795.32, reckoning simple interest at six per cent, and that subsequent to that date she mingled this sum with her own property, "used the same as her own, neglected to pay over the same to the representative of

the ward, and retained the same under such circumstances as warrant the court in imposing compound interest," and he, accordingly, in finding the amount due, computed compound interest at six per cent. The evidence is not reported. We understand that the ruling of the assessor, "that as matter of law compound interest should be computed on the balance," was based on the facts found by him, as before stated, in regard to the manner in which the guardian had dealt with the trust property, and that, when he states that the guardian retained the sum due the ward's estate under such circumstances as warrant imposing compound interest, he means that she mingled it with her own property, used it the same as her own, and neglected to pay it over. It does not appear that the guardian was engaged in business and employed the ward's property in it, what use the guardian made of the property, or that she received any income or profit from it, or that there was any wrongful intent on her part. It is not found that a demand was made upon her by the representatives of the ward, or that she refused to account. There is no finding as to what the property of the ward consisted of. It is stated that her own consisted largely of real estate standing in her own name and that of a third person, but that is all. It is not found, in terms at least, that there was any wilful breach of trust, and it is not unlikely that the manner in which she dealt with the property was due to a failure to discriminate clearly between relations arising out of the fact that the ward and her children were her daughter and grandchildren and her duties as probate guardian. And the question is whether the fact that the guardian mingled the property of the ward's estate with her own, used it the same as her own, and neglected to pay it over, justifies, without anything more appearing, the imposition of compound interest at the rate established by law in this Commonwealth for simple interest. We do not think that it does. Simple interest at six per cent will undoubtedly yield more than the guardian would have been able to realize from any investment that she would have been authorized to make. In some cases it is said that compound interest is imposed as a penalty, but the more correct view seems to be that it is imposed because in the particular case it has been received, or is presumed to have been

received, or ought to have been received, or the circumstances were such that the court was unable to determine whether the person charged had or had not received it, and compelled him to account for it in order to make sure that the *cestuis que trust* received all to which they were entitled. *Attorney General v. Alford*, 4 DeG., M. & G. 843. *Burdick v. Garrick*, L. R. 5 Ch. 233, 241, 243. *Vyse v. Foster*, L. R. 8 Ch. 309, 333. *Schieffelin v. Stewart*, 1 Johns. Ch. 620. *Perry, Trusts*, § 471.

In other words, the principle of liability is accountability for what has been received, or ought to have been received, or must be presumed to have been received, and not punishment for a breach of duty. A guardian has no right to mingle the funds and property of his ward with his own, but it is doubtful whether the fact that he has done so will justify, without more, the imposition of compound interest. *Forbes v. Allen*, 166 Mass. 569. *McKim v. Blake*, 139 Mass. 593. *McKim v. Hibbard*, 142 Mass. 422. *White v. Ditson*, 140 Mass. 351. *Dunlap v. Watson*, 124 Mass. 305.

A guardian is bound to exercise strict fidelity and a sound discretion in caring for the interests of his ward, and if his neglect in paying over or investing is culpable, he will be charged with interest on the ground that it will be presumed that he received it, or ought to have received it; but it seems to us that he ought not to be charged with compound interest unless the neglect is so gross as to warrant the presumption that he received or ought to have received that also. *Lamb v. Lamb*, 11 Pick. 371, 374, 375. *Wyman v. Hubbard*, 13 Mass. 232. *Fay v. Howe*, 1 Pick. 527. *Boynton v. Dyer*, 18 Pick. 1. *Elliott v. Sparrell*, 114 Mass. 404. *Attorney General v. Solly*, 2 Sim. 518. *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508. *Manning v. Manning*, 1 Johns. Ch. 527. *Ex parte Ogle*, L. R. 8 Ch. 711, 716. Such an inference will be drawn with less difficulty where there is an element of fraud in the conduct of the guardian or trustee; but in this case none is found. Generally the cases in which compound interest has been allowed have been cases in which, in violation of his trust, the trustee or guardian has employed the trust property in trade, business, speculation, or some other manner for his private benefit, and has received an income or profit therefrom, or cases in which there was an element of

fraud, or where there were productive stocks and securities which he had converted to his own use, or where there were express directions to pay over or to invest, or where there were other circumstances tending to show gross delinquency on his part. *Robbins v. Hayward*, 1 Pick. 528, note. *Jennison v. Hapgood*, 10 Pick. 77, 104, 105. *Boynton v. Dyer*, 18 Pick. 1. *Elliott v. Sparrell*, 114 Mass. 404. *Hook v. Payne*, 14 Wall. 252. *McKnight v. Walsh*, 8 C. E. Green, 136. *Farwell v. Steen*, 46 Vt. 678. *Jones v. Foxall*, 15 Beav. 388, 392. *Swindall v. Swindall*, 8 Ired. Eq. 285. *Schieffelin v. Stewart*, 1 Johns. Ch. 620. *Perry, Trusts*, § 471. *Story, Eq. Jur.* § 1277.

A majority of the court do not think that the circumstances in this case are such as to justify the imposition of compound interest; but that simple interest at six per cent should be reckoned from the 10th day of December, 1887, down to the issuing of the execution. The result is that on this branch of the case the defendant's exceptions are sustained. Decree to be entered in accordance with this opinion. *So ordered.*

COMMONWEALTH vs. INTOXICATING LIQUORS, THOMAS
H. MCCARTHY, claimant.

Plymouth. October 18, 1898. — January 5, 1899.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

*Statute — Constitutional Law — Transportation of Liquors into Non-license
Cities and Towns — Forfeiture.*

The St. 1897, c. 271, entitled "An Act to further regulate the transportation of spirituous and intoxicating liquors into no-license cities and towns," is well within the right of the State under the police power to legislate as to intoxicating or spirituous liquor, and is constitutional.

Section 2 of St. 1897, c. 487, which declares that the provisions of Pub. Sts. c. 100, relating to the seizure and forfeiture of intoxicating liquors shall apply to St. 1897, c. 271, regulating the transportation of intoxicating liquors into no-license cities and towns, is to be construed as making the general scheme of enforcing forfeiture found in Pub. Sts. c. 100, §§ 80-46 inclusive, applicable to the forfeitures under St. 1897, c. 271, with such modifications as required by the ground of forfeiture, and as thus interpreted is sufficiently definite, and is constitutional.

COMPLAINT to the Police Court of the city of Brockton, under St. 1897, c. 271, entitled "An Act to further regulate the transportation of spirituous and intoxicating liquors into no-license cities and towns," and acts in amendment thereof, for the seizure and forfeiture of certain vessels and intoxicating liquors contained therein for not being marked as required by that statute. At the trial in the Superior Court, before *Hopkins, J.*, the following facts were agreed upon.

The New York and Boston Despatch Express Company, in whose possession the liquors were found, and from which they were seized, is a corporation regularly and lawfully conducting a general express business between Boston and Brockton. There was delivered to them to be transported into Brockton a barrel containing ten dozen bottles of ale, the barrel being marked on the outside simply, "T. H. McCarthy, Brockton, Mass."; and not being marked with the address by street and number of the claimant, nor with the name and address of the seller, nor with the kind and amount of liquor contained therein. Licenses of the first five classes named in the Public Statutes had not at the time of the seizure been granted in Brockton; and the liquors were not intended by McCarthy to be sold in violation of law, but were intended for his private use.

The claimant requested the following rulings:

"1. That St. 1897, c. 271, under which the vessels and liquors complained against were seized, is in violation of the fundamental principles of natural right and justice, which guarantee to every man the right to acquire property and enjoy it in any way consistent with the equal rights of others, free from all restrictions and regulations, unless the same are imperatively required by public necessity for the safety, comfort, and well being of society, and is unconstitutional and void. 2. That in making said chapter 271 the Legislature exceeded the power conferred upon it by Article 4 of Chapter 1 of the Constitution of Massachusetts, which gives it full power and authority to pass and make only *wholesome and reasonable* laws and statutes, and is unconstitutional and void. 3. That said chapter 271 is in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, which declares that 'No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law,' and is unconstitutional and void. 4. That § 3 of chapter 271, which provides that all vessels or packages containing intoxicating liquors addressed and marked contrary to the particular provisions of § 1 of the same chapter, or to a fictitious person, or to a person unknown or who cannot be found, shall, with the liquor contained therein, be seized and adjudged forfeited to the Commonwealth, is in violation of Article 1 of the Declaration of Rights of the Constitution of Massachusetts, which declares that 'All men . . . have certain natural, essential, and unalienable rights, among which may be reckoned . . . that of acquiring, possessing, and protecting property,' and is unconstitutional and void. 5. That said § 3 is in violation of Article 12 of the Declaration of Rights of the Constitution of Massachusetts, which declares that 'No subject shall be . . . deprived of his property, immunities, or privileges, . . . or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land,' and is unconstitutional and void. 6. That said § 3 is in violation of Article 14 of the Declaration of Rights of the Constitution of Massachusetts, which declares that 'Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions,' and is unconstitutional and void. 7. That said § 3 is in violation of Article 26 of the Declaration of Rights of the Constitution of Massachusetts, which declares that 'No magistrate or court of law shall . . . impose excessive fines, or inflict cruel or unusual punishments,' and is unconstitutional and void. 8. That the provisions of Pub. Sts. c. 100, which by § 2 of St. 1897, c. 487, shall apply to the provisions of said chapter 271, and regulates all seizures and forfeitures of packages and liquor under said chapter, do not clearly and unequivocally require and direct such a course of proceedings as must be specifically prescribed in order to satisfy those requirements of the Declaration of Rights in the Constitution of Massachusetts which declares, Article 1, 'All men . . . have certain natural, essential, and unalienable rights,' among others 'that of acquiring, possessing, and protecting property.' Article 10, 'Each individual . . . has a right to be

protected by it in the enjoyment of his . . . property, according to standing laws.' Article 11, 'Every subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without being obliged to purchase it; completely and without any denial; promptly, and without delay; conformably to the laws.' Article 12, 'No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land,' and is unconstitutional and void. That for each and all of the above reasons the vessels and liquors complained against were wrongfully seized, and should be ordered returned to the claimant."

The judge refused to give any of the rulings requested, and the claimant alleged exceptions. The jury found upon the issue submitted to them that the package contained intoxicating liquors which were addressed contrary to the provisions of St. 1897, c. 271. The court rendered judgment that the liquor and the vessels containing it were forfeited to the Commonwealth.

R. W. Nutter, for the claimant.

R. O. Harris, District Attorney, for the Commonwealth.

HAMMOND, J. Subject to the power of Congress over foreign and interstate commerce, the right of a State to regulate by reasonable laws the manufacture, sale, or transportation of spirituous or intoxicating liquors within its own territorial limits is established by numerous decisions, both of State and national courts. Such a law is not inconsistent either with the Constitution of our State or that of the United States. It comes well within the authority called the police power, subject to which, in various ways, all private property is held, and it is unneces-

sary to restate here the principles upon which it rests. *Commonwealth v. Blackington*, 24 Pick. 352. *Commonwealth v. Kendall*, 12 Cush. 414. *Commonwealth v. Clapp*, 5 Gray, 97. *Commonwealth v. Williams*, 6 Gray, 1. *Commonwealth v. Bennett*, 108 Mass. 27. *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153. *Commonwealth v. Ducey*, 126 Mass. 269. *Beer Co. v. Massachusetts*, 97 U. S. 25. *License Cases*, 5 How. 504. *Leisy v. Hardin*, 135 U. S. 100. *Carstairs v. O'Donnell*, 154 Mass. 357. *Mugler v. Kansas*, 123 U. S. 623, and cases therein cited.

And we do not see that St. 1897, c. 271, goes beyond the fair and reasonable exercise of that right. The first section provides that "All spirituous or intoxicating liquors to be transported for delivery to or in a city or town where licenses of the first five classes have not been granted, when to be transported for hire or reward, shall be delivered by the seller or consignor to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business, in vessels or packages plainly and legibly marked on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and with the kind and amount of liquor therein contained." It then provides that delivery of any part of such liquors "to any person other than the owner or consignee whose name is marked by the seller or consignor on said vessels or packages, or at any other place than thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place where such delivery is made." Section 2 provides that the carrier shall keep a certain detailed record of the reception and delivery of such liquors. Section 3 provides that all packages containing intoxicating liquors addressed contrary to the provisions of this act, or to a fictitious or unknown person, or to a person who cannot be found, shall be declared forfeited to the Commonwealth.

The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defence that the

liquors found in the possession of the carrier were for delivery by him as such to some person.

It is only one of the many statutes which indicate that the policy of the Commonwealth is to require that the traffic in liquors in this State shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected. Examples of this policy are to be found in the third section of chapter 100 of the Public Statutes, requiring a druggist to keep a record of his sales, which record shall be at all times open to the inspection of certain public officers; in the ninth section, which provides that the license shall be displayed upon the premises in a conspicuous position; in the twelfth section, which provides that "No . . . licensee shall place or maintain, or permit to be placed or maintained, upon any premises used by him for the sale of spirituous or intoxicating liquor under the provisions of his license, any screen, blind, shutter, curtain, partition, or painted, ground, or stained glass window, or any other obstruction, or shall expose in any window upon said premises any bottle, cask, or other vessel containing, or purporting to contain, intoxicating liquor, in such a way as to interfere with a view of the business conducted upon the premises"; and in the fifteenth section, which provides that certain public officers may enter upon the licensed premises to see how the business is conducted, and may take samples of the liquor for examination and analysis.

Nor is there any ground for saying that the forfeiture is to be regarded as in the nature of an excessive or unusual punishment.

The first seven requests, therefore, were rightly refused.

The eighth request concerns more particularly the judicial proceedings for enforcing the forfeiture. The statute named no way of enforcing such forfeiture, and hence the only way was through the provisions of Pub. Sts. c. 194, the proceedings under which are carried on upon the civil side of the court. In this state of the law, St. 1897, c. 487, was passed, the second section of which is as follows: "The provisions of chapter one hundred of the Public Statutes, relating to the seizure and forfeiture of intoxicating liquors, shall apply to the provisions of

chapter two hundred and seventy-one of the acts of the year eighteen hundred and ninety-seven."

These provisions are to be found in Pub. Sts. c. 100, §§ 30-46, both inclusive. They were framed with great care, and contain specific and complete directions for the seizure and forfeiture of liquor illegally kept for sale. They are frequently invoked for that purpose, and we do not understand that their constitutionality as now existing is contested by the claimant.

The Legislature desired to have the process for perfecting the forfeitures under St. 1897, c. 271, carried on upon the criminal side of the court, and they had already upon the statute book a complete, long established, and constitutional system provided for similar cases, and so the second section of St. 1897, c. 487, was passed.

It is contended by the claimant, in his brief, that these provisions of Pub. Sts. c. 100, "do not fit the case, and are wholly inadequate to meet the constitutional requirements. An honest effort to apply them wholly fails. They are framed to provide for the destruction of liquors intended for sale contrary to law. This is the gist of the offence. Such intent has to be sworn to before process will issue, and it must be alleged in both the complaint and the warrant." Also that "they prescribe a course of proceeding which meets all the exacting constitutional requirements where keeping with intent to sell is the ground for the forfeiture. But they are not at all adapted or suitable for chapter 271, where no intent to sell need be shown, and where the grounds for the forfeiture are very different."

An examination of these sections of Pub. Sts. c. 100, shows that (§ 30) to procure a search warrant the oath or affirmation must be that the deponents have reason to believe, and do believe, that liquor is kept in a certain place "and is intended for sale contrary to law," or has been brought into a town "in violation of the provisions of section seventeen" of Pub. Sts. c. 100, and the magistrate or court, "upon its appearing that there is probable cause to believe said complaint to be true, shall issue a warrant of search."

The other sections provide for the service of the warrant, notice to parties, and a hearing, and (§ 37) "If it appears that the liquor, or any part thereof, was at the time of making the

complaint owned or kept by the person alleged therein, for the purpose of being sold in violation of law, the trial justice or court shall render judgment that such and so much of the liquor so seized as was so unlawfully kept, and the vessels in which it is contained, shall be forfeited to the Commonwealth."

It appears that the whole foundation of the proceedings and the cause and ground of the forfeiture are that the liquors are kept "for the purpose of being sold in violation of law."

But the cause and ground of forfeiture declared in St. 1897, c. 271, is that the liquors are in the hands of a common carrier for transportation to a town where certain licenses have not been granted, and are intended for delivery contrary to law, and the proceedings to enforce such forfeiture, including the decree of the court declaring it, must be based upon that ground.

If, therefore, the second section of St. 1897, c. 487, is to be construed as meaning that in every respect these provisions of Pub. Sts. c. 100, are to be followed, whether applicable or not, we have an interpretation which is not only unconstitutional, but is nonsensical. As stated in the claimant's brief, "an honest effort" to apply the provisions "wholly fails."

It is to be presumed, however, in the absence of anything to the contrary, that the Legislature intended to say only that which it had the constitutional right to say, and no statute will be construed so as to render it unconstitutional if there be any constitutional interpretation reasonably possible.

As was stated by Shaw, C. J., in *Commonwealth v. Kimball*, 24 Pick. 366, 370, "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion." Proceeding under this rule of interpretation, we think that St. 1897, c. 487, § 2, may be taken to mean that with the proper modification of the oath and adjudication as suggested and required by the ground of forfeiture under St. 1897, c. 271, the general form of machinery set out in the provisions of Pub. Sts. c. 100, for

enforcing forfeitures, is applicable and is to be followed. This interpretation provides for the rights of all parties, is "best suited to accomplish the objects of the statute," namely, the judicial declaration of the forfeiture incurred under St. 1897, c. 271, appears most reasonable, violates no rule of construction, and is constitutional.

The court properly refused to give the eighth request.

Exceptions overruled.

DAMASE PAIN vs. SOCIÉTÉ ST. JEAN BAPTISTE.

Bristol. October 24, 1898. — January 5, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Beneficiary Association — Power to amend By-Law — Construction of By-Law.

A beneficiary association organized under Pub. Sts. c. 115, which has reserved the power to amend its by-laws without limitation or restriction, may so amend them as to affect the right of a member to future benefits under a disability existing when the amendment is made.

A by-law of a beneficiary association, providing that every member should have a right to five dollars a week if he became disabled during a period not exceeding thirteen weeks in each year, was amended so as to provide that "when a member has received thirty-nine weeks of sick benefits . . . he shall not hereafter receive more than one dollar per week, instead of five dollars, for thirteen weeks of each year," during a period of five years. *Held*, that the amended by-law applied to a member who, at the time of its adoption, was under a disability, and had received payment of benefits for thirty-nine weeks.

CONTRACT, to recover the amount of benefits alleged to be due to the plaintiff as a member of the defendant society. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

L. E. Wood, (A. G. Weeks with him,) for the plaintiff.

H. A. Dubuque, for the defendant.

HAMMOND, J. The defendant society is a beneficiary organization, chartered in 1884, under Pub. Sts. c. 115, and ever since its incorporation the plaintiff has been a member in good standing. In June, 1890, the plaintiff by reason of sickness became unable to work, and has so continued to the present time, and

during that time he has received benefits at the rate of five dollars per week for thirteen weeks of each year, down to July 7, 1896; and since the latter date he has received benefits at the rate of only one dollar per week for thirteen weeks of each year. This suit is brought to recover the additional four dollars per week for a period of nine weeks.

Whether the plaintiff can recover depends upon the construction and effect of the amendment of the by-laws which was passed on July 7, 1896. If it is applicable to him, he cannot recover, if not, he can.

The by-law of 1893, which, so far as the plaintiff is concerned, was not materially different from that of 1889, under which the plaintiff was receiving aid at the time of the amendment in question, was as follows: "Every member who shall belong to the society for twelve consecutive months, who has paid his dues, contributions, fines, or other sums assessed by vote or by-law of the society, shall have a right to five dollars per week if he becomes unable to work, in consequence of sickness or accident, during a period not exceeding thirteen weeks in each year, beginning from the date of the first application for benefits." And the amendment of July 7, 1896, was as follows: "Provided that when a member has received thirty-nine weeks of sick benefits, or one hundred ninety-five dollars, for the same or a different period of disability, then he shall not hereafter receive more than one dollar per week, instead of five dollars, for thirteen weeks of each year, if his sickness shall so long continue; and that during a period of five years, aggregating sixty-five dollars of benefits. Each year reckons from the date of the first application for benefits. If after that period of five years he is still unable to work, he is then entitled to five dollars a week for thirteen weeks of each year for three years, as at first. This partial suspension of benefits is established so as to allow as much as possible all the members to share more equitably in the disability funds."

The plaintiff concedes that the amendment was duly passed, but in his brief contends, in the first place, that "the defendant society cannot by such an amendment, under the circumstances of this case, so change its obligation to the plaintiff," because his "originally contingent right to receive benefits as stated became vested upon the happening of the contingency, i. e. his disability

to work, June 7, 1890, and from that time no act of the society, by amendment to its by-laws, could divest him of that right"; and in the second place, that even if his rights "were not vested and could be taken away by amendment of the by-laws, such amendment could have no retroactive force," and that "to hold that payments of benefits made before the adoption of the amendment can be applied to benefits accruing under the amendment will make such amendment retroactive in force, and will place the plaintiff in a worse position than the other members of the society at the time of the adoption of the amendment."

The plaintiff's contention, more briefly expressed, is that the defendant had no power to amend its by-laws so as to affect his rights to future benefits under a disability then existing, and even if it has such power this amendment fairly construed does not affect such rights. The rights of the plaintiff are determined by the nature of the contract between him and the society, as interpreted by the by-laws under which it was made and in the light of the surrounding circumstances. The general purpose of the society was to give pecuniary aid to its sick or disabled, and in case of the death of a member to provide for the relief of his family. The fund for this purpose was to be raised by monthly dues, and, in case of death, by an assessment upon the survivors. Of course the amount of benefits which the society, with due regard to the interest of the sick as well as that of the other members, could properly pay depended upon many circumstances, such as the number of its members, the actual or relative number of the sick, the promptness with which dues were paid, and others of similar nature; and, as these various circumstances might and probably would change from time to time, it might be regarded, not only as prudent, but as necessary for the successful management of the society, that there should exist the power to make such corresponding changes in the by-laws as the circumstances for the time being seem to require.

The power to amend the by-laws was reserved, and there is no limit to the reservation. After certain preliminary proceedings, its by-laws could be amended at any time and in any reasonable way. All this the plaintiff well knew from the first, and he was present at the meeting of July 7, 1896, and spoke against the adoption of the amendment.

There being a power of amendment reserved, the contract between the plaintiff and the society was liable to changes with regard to future benefits to which a disabled member might be entitled, as well as in other matters, and the plaintiff had agreed that these changes duly made in compliance with the rules of the society should be binding upon him, not as a new contract, but as a part of the old contract and under its provisions.

But the plaintiff contends that there is an implied limitation to this power of amendment, that it cannot be made so as to deprive him of a vested right, and that his right to the benefit became fixed by his disability, and can never be changed during that disability. But how does the right become fixed? There is no such restriction contained in the words expressing the power of amendment. To thus restrict the power would be to divide the society into two classes, one comprising those like the plaintiff, who could not be affected by any reduction of future benefits, and the second comprising the well members, who would be affected by such reduction. And no matter how many of these preferred pensioners there might be, this society, whose right to graduate payment according to varying circumstances has been reserved so carefully, and in language so general and comprehensive, and which is so plainly necessary to the purposes for which it was incorporated, is powerless to do what might be necessary even to its own existence. There can be no right to future benefits vested in one member more than in another. The right of a sick member to future benefits which becomes vested in the plaintiff at the time of the disability is not a right to receive so long as such disability continues the future benefits provided by the by-law existing at the time the disability begins, but simply a right to receive them subject to such changes as may be made by the society, and it is no violation of such a vested right to make the changes at any time. Such a change is not a repudiation of the terms of the contract, but on the contrary is in accordance with them.

As was said in *Smith v. Galloway*, [1898] 1 Q. B. 71, 77, "Where . . . the original contract . . . provides for alteration of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be." Such an interpretation of the contract

seems to be in accordance with the provision for amendments, and to be the only one reasonably calculated to subserve the interests of all, and to enable the society to accomplish the objects for which it was incorporated.

We are aware that the doctrine herein enunciated is inconsistent with some decisions in other States, but we are satisfied that it is sustained by the better reasoning and the weight of authority. *Smith v. Galloway*, [1898] 1 Q. B. 71. *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557. *Poultney v. Bachman*, 31 Hun, 49. *Bowie v. Grand Lodge*, 99 Cal. 392. *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362. *Knights of Pythias v. Knight*, 117 Ind. 489; *S. C. 3 L. R. A.* 409, and note. *Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 449. *Loeffler v. Modern Woodmen of America*, 100 Wis. 79. *Borgards v. Farmers' Ins. Co.* 79 Mich. 440. *Moore v. Union Fraternal Accident Association*, 103 Iowa, 424. *Carpenter v. Knapp*, 101 Iowa, 712. *Hughes v. Wisconsin Odd Fellows' Ins. Co.* 98 Wis. 292. *Catholic Knights of America v. Morrison*, 16 R. I. 468.

Of course no amendment could change the amount of any benefit which under any by-law has passed from a possible to that of a future benefit and has become a debt. The right becomes vested absolutely as the time expires for which the benefit is granted.

As to the second contention of the plaintiff, it is sufficient to say that we think the by-law applies to the case of the plaintiff. The language is broad enough to cover his case. The plaintiff had received more than "thirty-nine weeks of sick benefits," and it was provided that such a person shall "not hereafter receive more than one dollar per week." We have no doubt the construction put upon the amendment by the officers of the society was the one intended and justified by the language.

Judgment affirmed.

EDWARD H. MURPHY vs. CITY COAL COMPANY.

Bristol. October 25, 1898. — January 5, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Negligence — Assumption of Risk — Due Care.

The risk which a workman assumes by virtue of his contract of employment, under the employers' liability act, St. 1887, c. 270, does not include the risk arising from the negligent act of a superintendent.

In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff by being jammed between a car used for transporting coal and an apparatus called a pick-up which propelled the car, there being a possible phase of the case where the risk was not assumed by the plaintiff, the defendant is not entitled to a ruling that, "if the jury find that the plaintiff engaged to run the car in question and undertook that employment, and if the jury find the liability of the pick-up to injure a person in the situation in which the plaintiff was hurt to be proven, then that danger was an obvious risk assumed by the plaintiff for which he cannot recover"; and if it is stated in the bill of exceptions that "full general instructions appropriate to the case were given by the court to the jury, which were not excepted to otherwise than as herein appears," it will be presumed that the jury were rightly instructed upon the subject.

If a workman, without waiting to ascertain why an apparatus used in the business in which he is employed fails to work, of his own motion and without any direct command goes from a place of safety to a position of danger in which he is hurt, he cannot recover for his injury, if he appreciated the danger, or in the exercise of reasonable care ought to have been aware of it.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries received by the plaintiff while engaged in discharging coal. Trial in the Superior Court, before *Lilley, J.*, who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that the plaintiff was injured while in the employ of the defendant, by being caught and jammed between a car used for the transportation of coal from a hopper to bins in which it was to be deposited for delivery when sold, and a certain apparatus called a pick-up; that this car was operated on a track elevated upon a trestle-work above the succession of bins in which the coal was dumped; that the car was propelled by this pick-up when power was communicated to it by the action of a certain apparatus called a triangle, and located beneath the hopper; that this triangle was connected with the pick-up by means of a rope or cable running

over pulleys ; that when loaded at the hopper the car moved upon this slightly inclined track by force of gravity until it came in contact with the pick-up, which it pushed to the spot where it was intended to dump the load ; that at this spot was stationed on the side of the rail a certain other apparatus so constructed as automatically to open the sides of the car and empty it of its load ; that thereupon the car, being thus lightened, was pushed by the pick-up, by reason of the weight of the triangle communicating power to it, for a distance of about fourteen feet, and received an impulse that gave it requisite momentum to return to the hopper for reloading ; that on the occasion of the accident to the plaintiff, the triangle, a loose plank having been temporarily caught beneath it, failed to work, so that the pick-up did not start the car, and it remained motionless upon the track at the spot where it was unloaded ; that thereupon the plaintiff, who was standing at the time on the south side of the track watching the operation of the mechanism, and in a place of safety, inquired of one Rowe, who was standing at the hopper, what the reason was that it did not work, and was told that the trouble must be at the plaintiff's end ; that, without waiting to ascertain the difficulty, the plaintiff stepped upon the track in the rear of the pick-up and at once commenced to push the car away from the pick-up ; that when the car had moved sufficiently, he stepped over the pick-up between that and the car and continued to push it along by hand ; that at this moment, while the plaintiff was between the pick-up and the car, pushing the latter forward, and some little distance from the pick-up, the defendant's foreman observed the plank under the triangle and directed a person to remove the same so that the triangle would work ; and that, upon his so doing, the triangle instantly fell, communicated power to the pick-up through the rope or cable, and caused the pick-up to advance upon the plaintiff, jamming him between it and the car, and causing the injuries complained of.

On cross-examination, the plaintiff testified, among other things, as follows. He was employed first in the forenoon of the day before the accident occurred, and went to work about noon of the following day. This accident was at the second time the car was loaded, and the first time it went down after

he was assigned his place to work. At the time he was employed, one Witherell, the defendant's superintendent, asked him if he would run the car for him. The plaintiff replied, "No, I did not understand running it. I would like to go trimming." Witherell replied, "Yes, you do, I would like to have you go and run it; I have trimmers enough"; and further told the plaintiff to go up and run the car, and that he would send one Rowe to help him. At the time of the conversation, the plaintiff did not expect the car to be moved back by machinery, and did not know what trouble there might be in pushing it back before the job was finished. The first time the car was unloaded after the plaintiff went to work, it was not in charge of the plaintiff, who was at the hopper; and the apparatus failing to work, the plaintiff saw the car pushed back by hand. The plaintiff for about two years had been employed in another coal yard, and had seen dump cars operated and unloaded automatically. He was always employed on the brow, and never at the hopper, and never had anything to do with the apparatus. He knew that there was a weight in a box connected in some way with the pick-up, and that the two together returned the dump car to the hopper. How connected and in what way it operated he did not know.

There was other testimony tending to prove that the plaintiff by previous occupation had had experience in connection with a similar device for propelling cars in a similar service.

There was evidence tending to show that Witherell was the superintendent of the defendant. There was other evidence tending to show due care on the part of the plaintiff, and negligence on the part of Witherell, at the time the plaintiff was hurt.

The defendant asked the judge to instruct the jury as follows: "If the jury find that the plaintiff engaged to run the car in question, and undertook that employment, and if the jury find the liability of the pick-up to injure a person in the situation in which the plaintiff was hurt to be proven, then that danger was an obvious risk assumed by the plaintiff, for which he cannot recover." The judge declined to give this instruction.

The defendant also requested the judge to instruct the jury that "if they found that the plaintiff, when he asked the cause

of the trouble, was standing in a place of safety, and without waiting to ascertain why the pick-up did not work, voluntarily placed himself in a position of danger and was injured in consequence, he cannot recover."

The judge gave this instruction, but modified it by adding at the conclusion the words, "if he appreciated the danger, or in the exercise of reasonable diligence ought to have been aware of it."

Full general instructions appropriate to the case were given to the jury, which were not excepted to otherwise than as herein appears.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. M. Knowlton & A. E. Perry, (C. J. Noyes with them), for the defendant, submitted the case on a brief.

L. LeB. Holmes & A. B. Collins, for the plaintiff.

HAMMOND, J. 1. The first request was rightly refused. The evidence, so far as disclosed in the report, tended to show that the defendant's superintendent ordered the removal of the board obstructing the triangle before the car had passed over the fourteen feet of track in which the pick-up operated, and while the plaintiff was in this dangerous space of the track; and that "upon his so doing, the triangle instantly fell, communicated power to the pick-up through this rope or cable, and caused the pick-up to advance upon the plaintiff, jamming him between it and the car, thus producing the injuries for which he complains"; and the jury would have been warranted in finding that this order was negligent. Even if the liability of the pick-up to injure a person in the situation in which the plaintiff was when hurt was an obvious risk of the business assumed by the plaintiff, that rule was not applicable to the case if the jury found that the accident was caused by the negligent act of the superintendent. The risk which the workman assumes by virtue of his contract of employment does not include the risk arising from the negligent act of a superintendent. If it did, the purpose of the statute under which the case was submitted to the jury would be defeated. *Malcolm v. Fuller*, 152 Mass. 160, 167. *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 536. *McPhee v. Scully*, 163 Mass. 216. *Smith v. Baker*, [1891] A. C. 825.

There being a possible phase of the case where the risk was not assumed by the plaintiff, the judge could not properly have given the ruling in the broad and unqualified form in which it was requested, and as it is stated in the bill of exceptions that "Full general instructions appropriate to the case were given by the court to the jury, which were not excepted to otherwise than as herein appears," we must presume that the jury were rightly instructed upon the subject.

2. In dealing with the second request, some embarrassment arises from the difficulty in ascertaining what it means. The counsel for the defendant in his brief seems to think that it should be interpreted as meaning in substance that, if the plaintiff of his own motion went outside the scope of his employment when he placed himself between the pick-up and the car, or, in other words, if the plaintiff in moving the car was a mere volunteer, he cannot recover.

But we do not think that is the fair and natural import of the language. The judge was justified in interpreting it, as he evidently did, as meaning that if, without waiting to ascertain why the pick-up did not work, the plaintiff of his own motion and without any direct command went from a place of safety to a position of danger in which he was hurt, he cannot recover; and hence he gave the instruction with the modification "if he [the plaintiff] appreciated the danger, or in the exercise of reasonable diligence ought to have been aware of it."

And this, we think, was correct. While the plaintiff had worked elsewhere in a similar employment for some years, he had begun to work on this job only a few hours before he was hurt. He testified that when, upon his application for employment, Witherell asked him if he "would run the car for him," he replied in the negative, saying he "did not understand running it." The car which passed from the bins to the hopper end of the trestle just before this car was pushed to the hopper in the same way in which this was, and the plaintiff saw it done. It does not appear that anything was said by anybody against that act. This request bears only upon the question of the plaintiff's due care. The jury may have found, upon all the evidence on this branch of the case, only a part of which is before us, that the plaintiff was warranted in thinking that

whenever the pick-up did not move he was expected to push the car back, and that, so thinking, he went upon the trestle for that purpose. If that was his idea, then, so far as the question of his due care was concerned, he was not necessarily precluded from recovering, unless he appreciated the danger, or in the exercise of reasonable diligence ought to have been aware of it, and this would be so although he was not directly commanded to do it, but did it of his own motion, or "voluntarily."

Exceptions overruled.

SETH TWICHELL vs. MARY McNABB.

Worcester. November 15, 1898. — January 5, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

*Use and Occupation — Action — Defence — Termination of Tenancy
— Husband and Wife.*

A married woman, in an action against her for use and occupation of a tenement, has no ground of exception to a refusal to rule that the tenancy created by a prior agreement between the plaintiff and the defendant's husband must terminate and cease, either by an eviction or by the husband's vacating the premises, and that if he was not evicted and did not vacate he was in possession, and the plaintiff could not recover.

CONTRACT, for use and occupation of a tenement from January 1, 1894, to January 1, 1897. Trial in the Superior Court, before *Hopkins, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that, in May, 1892, John McNabb, husband of the defendant, hired of him the tenement by a verbal contract at a rental of ten dollars per month, and that McNabb with the defendant and their children entered into occupation and continued the same until September, 1893, when McNabb ceased to be the plaintiff's tenant; that the rent was in arrears, and the tenancy of McNabb was for that and other reasons unsatisfactory to the plaintiff; that the plaintiff then went to the tenement and had a conversation with the defendant, in which he stated that he was not getting his rent, and that for this and

other reasons he was not satisfied, and that they must move out of the house; that the defendant then agreed with the plaintiff to hire the house from that date, paying eight dollars per month until spring and ten dollars per month afterward, and that the plaintiff then agreed to rent the house to the defendant upon these terms. The plaintiff further testified that the defendant with her husband and children thereafter continued to occupy the tenement during the time alleged in the plaintiff's declaration; that from September, 1893, the rent bills were made to the defendant, and certain receipted rent bills in the name of the defendant, covering the first portion of the time after September, 1893, were produced by the defendant.

These bills were a printed form, with a blank space for the name and month and for signature, and were written in pencil to Mrs. John McNabb. The rent bills prior to September, 1893, were made to Mr. John McNabb, and were of like form.

The defendant denied that there was any such conversation or agreement between her and the plaintiff.

There was no evidence that the husband had any actual knowledge of the agreement between his wife and the plaintiff, or of any change in the occupancy of the premises except such as might be inferred from the fact that he was the husband of the defendant, and that the receipted rent bills in her name were produced from the possession of the defendant; and nothing was ever said by the plaintiff to John McNabb concerning any change in the tenancy of the premises.

It also appeared in evidence that, prior to September, 1893, all payments of rent, except two or three times, had been made by the defendant, and the receipts therefor taken in her husband's name; and that McNabb left the money with her to make the payments.

The defendant requested the judge to instruct the jury that the tenancy created by the agreement between the plaintiff and John McNabb must terminate and cease, either by an eviction or by his vacating the premises, and that if he was not evicted and did not vacate, he was in possession, and the plaintiff could not recover.

The judge declined to give this instruction, and gave certain instructions not excepted to.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. H. McMahon, for the defendant.

C. F. Baker & W. P. Hall, for the plaintiff.

LATHROP, J. The only exception in this case is to the refusal of the judge to rule that the tenancy created by the agreement between the plaintiff and John McNabb must terminate and cease, either by an eviction or by his vacating the premises, and that if he was not evicted and did not vacate, he was in possession, and the plaintiff could not recover.

The same defence, that there must be a termination of the tenancy of the husband before there could arise a tenancy of the wife, was made without success in *Rogers v. Coy*, 164 Mass. 391. As was said in that case: "The action, however, does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter." *Exceptions overruled.*

THOMAS H. BRADY vs. ORLANDO W. NORCROSS.

Hampden. September 28, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Defective Appliance — Inference of Negligence — Due Care — Parties — Evidence.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a plank on which the plaintiff was sitting while at work, and which was part of a temporary staging built to be used, and which had been used for six months by workmen in finishing the interior of a room in a building under construction, the fall being caused by the giving way of one of the brackets on which the plank was laid, by reason of the splitting of the boards composing the bracket where it was nailed to an upright, if the evidence does not tend to show that the defendant furnished the staging as a structure, nor that he assumed to exercise any control or supervision as to how it should be built or kept or adapted for the work, nor that he failed to furnish a sufficient quantity of suitable materials, nor that he employed improper workmen, the mere fact of the giving way of the bracket does not warrant the inference of negligence on his part. And the plaintiff would seem to have been in the exercise of reasonable care, and not to have been aware that he was exposed to any risks except those incident to working upon a safe staging.

The non-joinder of a partner is no defence to an action against his copartner for personal injuries sustained by an employee of the firm.

If evidence, the admission of which is excepted to, seems to have been competent upon the issues raised by one of two counts, and when those issues disappeared the excepting party did not ask that the evidence should be withdrawn from the consideration of the jury, who returned a verdict on the other count, the exception will not be sustained.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a part of a staging on which he was sitting while at work as a painter. The declaration contained three counts under the employers' liability act, St. 1887, c. 270, one of which was subsequently waived; and one at common law, alleging failure to provide the plaintiff with safe instrumentalities for his work. At the trial in the Superior Court, before *Bond, J.*, the jury returned a verdict for the plaintiff under the fourth count; and the defendant alleged exceptions, which appear in the opinion

H. Parker & C. C. Milton, for the defendant.

J. B. Carroll & W. H. McClintock, (J. F. Stapleton, Jr. with them,) for the plaintiff.

BARKER, J. The plaintiff, a painter in a building under construction, fell eighteen or twenty feet to the floor of a large room, from a plank which was part of a staging built in that room to be used there by masons and painters in finishing the interior of that room, and to be taken apart and removed when that work should be finished. The staging was made of ordinary construction timber, and consisted of uprights, held in place by ledger boards or braces, to which uprights were nailed tiers of brackets, upon which were laid, as the work might require, loose planks to support the workmen. Each bracket consisted of two boards nailed together at one end, and was fastened to an upright by nails driven through the other ends of the boards of which the bracket was made. One of the brackets, while helping to bear the weight of two planks and of three painters, gave way, the boards of which it was made splitting where it was nailed, and letting down the planks and the workmen. The plaintiff has obtained a verdict in tort, upon a common law count, against one of his employers. At the trial the defendant introduced no evidence, and his principal exception is to the refusal to rule that there was no evidence

upon which the plaintiff could recover upon the common law count.

As this was a temporary staging, intended to be used only in finishing the room where it was constructed, if the plaintiff's employers furnished sufficient quantities of suitable materials for staging, employed suitable workmen, and did not themselves undertake the duty of furnishing the staging as a structure, but only of supplying materials and labor by which it might be built and from time to time adapted to the work, and if the duty of furnishing or adapting the staging as an appliance for use in the work of finishing the room was intrusted to or assumed by the workmen themselves, within the scope of their employment, the employers are not answerable to the plaintiff for his injury. *Kelley v. Norcross*, 121 Mass. 508. *Colton v. Richards*, 123 Mass. 484. *Killea v. Faxon*, 125 Mass. 485. *Clark v. Soule*, 137 Mass. 380. *Hoppin v. Worcester*, 140 Mass. 222. *O'Connor v. Neal*, 153 Mass. 281. *Kennedy v. Spring*, 160 Mass. 203. *Adasken v. Gilbert*, 165 Mass. 443. *Kalleck v. Deering*, 169 Mass. 200.

On the other hand, if the staging was furnished by the employers as a completed structure, or if they themselves supervised and directed its construction, or if, relying upon its construction by their workmen for themselves, the employers negligently failed to provide suitable and sufficient materials, or negligently hired incompetent workmen, the employers might be answerable to the plaintiff. *Arkerson v. Dennison*, 117 Mass. 407. *Mulchey v. Methodist Religious Society*, 125 Mass. 487. *Clark v. Soule*, 137 Mass. 380. *Prendible v. Connecticut River Manuf. Co.* 160 Mass. 131. *Twomey v. Swift*, 163 Mass. 273.

There was no testimony tending to show that the employers furnished the staging as a completed structure, or that either of them exercised or assumed to exercise any personal oversight over its construction. Its history was not fully or satisfactorily disclosed by the evidence. The plaintiff began working in the building in August, 1896, and was hurt on March 2, 1897. He testified that the staging was in the room when he began to work in the building. Douglass, a quasi foreman of the painters but who also painted when he had time, testified that he began to work in the building about three months before the accident, and that the staging was then in the room. Ramilly, a painter,

who fell at the same time with the plaintiff, testified that he could not tell who built the staging. Knight, a painter at work upon the staging at the same time, testified that he did not know who built the staging, but that it was built before he came there to work in October, 1896. Pike, a painter who went there to work in August, 1896, testified that the painters did nothing about building the staging in that room; that he did not know the men who built it; that it was built under Smith's orders; and that the witness thought it was built after he came there, but was not sure. These were all the witnesses except Smith, who testified merely that he was employed by Norcross Brothers upon the building, and that they were doing the entire work, except that there was a sub-contract for the mason work. There was no other evidence as to how the staging was originally erected. Pike testified that Smith was a carpenter, and that he gave orders and directions, and that no one gave orders and directions to Smith except one Connors, whose relation to the work does not otherwise appear. Douglass also testified that Smith gave orders to build stagings, and orders to take them down when the workmen were through with them, and that the witness himself gave orders, and if there was trestle work would say, "Come, boys, let us put the trestle in that room and go on to it," and that he said this in regard to staging and trestle work. Knight also testified, "We painters did not customarily have anything to do with reference to the building or bracing of stagings," and that he had observed the structure of stagings in that building only in the store on the ground floor, and did not notice whether they were built under the direction or order of anybody. Douglass further testified to the previous condition of the staging, and to certain things which occurred on the Saturday previous to the accident, with reference to the preparation of the staging for its use by the painters in doing the work on which they were engaged when the accident happened. In substance this testimony was, that when he first went on the staging to prime the walls it seemed to be all right and did not lean, and he had no trouble with it; that when he came to the second coat another staging had been built over the main stair, and there were braces which held both stagings together and made them firm. This other staging had been taken down on

Friday or Saturday, under Smith's directions, and when Douglass on Saturday went on the remaining staging he noticed that it was shaky and leaned over toward the south wall, and he thought it ought to be braced to make it more firm. So on this Saturday, before the accident which occurred on the Tuesday following, Douglass, thinking that the staging was weak, and not safe to go on, asked Smith to fix the staging, to brace it up. Smith said it was all right, "just as it was when we [the painters] worked on it before," and "just as it was when the masons worked on it"; that he had taken no braces out; that he had raised the uprights to put a floor under it; that he did not know that that would have a tendency to weaken it. To this Douglass replied that he thought it would, but Smith again said he thought it was all right, to which Douglass replied, "I am going on there Monday with fifteen or twenty men, and I think the stage ought to be looked after"; but Smith said the staging was all right, and did not go with Douglass into the room where the staging was. Douglass then, with another painter under his directions, went and got more braces and braced the staging from the top, and went down in the yard and got planks and put them on and then put men to work on the staging to paint the ceiling of the room. He did not make any investigation of the lower part of the staging, and testified that, so far as his knowledge went, it was all right. On cross-examination Douglass testified that all that was done in the way of rectifying the condition in which he found the staging on Saturday was done by himself and another painter under his direction; that they did something to fix it up; that when he went to fix it, he got the material out of the yard; and he added: "There was n't material there to fix up the staging; these planks I got out in the yard were put on top of the staging, but these ledger boards were all there; these I did n't have anything to do with; where I went to get the material for that staging, out in the yard, there was other material of the same kind; I selected whatever planking or other material I and the other painters put upon that staging." He further testified that it was he and the other painters who got planks and laid them on the top brackets, and that they braced over the uprights against the iron casing, but did not nail braces across the staging, and that whatever was

done to the staging to fix it for the work was done by himself and another painter.

The evidence was that the boards of which the brackets were made were of spruce an inch and an eighth thick, and from four to eight inches wide. One end of the plank on which the plaintiff was sitting rested on the bracket which broke, and the other end rested on another bracket. The plaintiff alone was on this plank, but one end of another plank rested on the same bracket, and on this other plank were two other men. The fall of the plank on which the plaintiff was sitting also broke the bracket on which the other end of the plank had rested. The only theory of the accident seems to have been that the strain of the two planks and the three men split the boards on the bracket where it was nailed, and let it down. It should also be stated that one of the uprights of the staging had at some time been cut off some feet above the floor, although neither this fact nor the leaning which had been remedied by Douglass on the Saturday before the accident seems to have had anything to do with the giving way of the bracket.

It would seem a very questionable exercise of the power of drawing inferences of fact from facts proved to find from the splitting of the boards of the bracket that the materials of which it was built were originally defective or unsuitable for the purpose to which they were put, or that the bracket was not originally a safe one. The staging had been in use by both masons and painters for more than six months without accident. But if we assume that the giving way of the bracket was of itself evidence of negligence in its construction on the part of some one, as was assumed in *Arkerson v. Dennison*, 117 Mass. 407, 411, and in *Prendible v. Connecticut River Manuf. Co.* 160 Mass. 131, 139, we think it was not evidence from which it could fairly be inferred that the negligence was that of the plaintiff's employers. The burden was upon the plaintiff to show that he was hurt by their fault. The evidence did not tend to show that they furnished the staging as a structure, nor that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for the work, nor that they failed to furnish a sufficient quantity of suitable materials, nor that they employed improper workmen. For more than six months before

the accident this and other temporary stagings in use in the same building had been in the care of the workmen themselves, and not of the plaintiff's employers. In *Arkerson v. Dennison* the staging had been in use but two weeks, and in *Prendible v. Connecticut River Manuf. Co.* the staging was one to be moved about and used in different localities, and was held to be part of the employer's works, ways, and machinery. That the employers were at fault in the present instance was an inference which a jury ought not to be allowed to draw from the mere fact of the giving way of the bracket, and there was nothing else in the evidence to justify such a finding.

None of the other grounds of exception seem to us sound. The plaintiff would seem to have been in the exercise of reasonable care, and not to have been aware that he was exposed to any risks except those incident to working upon a safe staging.

Although the suit is against one only of the plaintiff's employers, the non-joinder of the defendant's copartner is no defence. *Milford v. Holbrook*, 9 Allen, 17, 22. The evidence the admission of which was excepted to seems to have been competent upon the issues raised by the other count, and when those issues disappeared the defendant did not ask that the evidence should be withdrawn from the consideration of the jury.

Exceptions sustained.

WILLIAM F. DUGGAN vs. NEW ENGLAND RAILROAD
COMPANY.

Worcester. October 3, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Railroad — Grade Crossing — Negligence — Instructions.

In an action against a railroad corporation under Pub. Sts. c. 112, § 218, for personal injuries caused by a collision of the defendant's engine with a sleigh in which the plaintiff was riding at a grade crossing, he and his companion, who was driving, testified that, when within twenty-five or thirty yards of the crossing, they stopped and listened, but heard no sound of an approaching train. There was evidence tending to show that the whistling post was nearer the crossing than the distance prescribed by the statute; and the engineer and fireman of the

train and other witnesses testified that the whistle was blown at the whistling post, and that the whistle and bell were sounded alternately to and over the crossing. The judge instructed the jury, among other things, as follows: "If you are satisfied that the failure to give those signals contributed to the injury, and if you find there was not gross negligence on the part of the plaintiff, or the person who was driving him, contributing to the injury, it is entirely within your province to infer from those facts that the failure to give the statutory signals did contribute to the injury to the plaintiff." *Held*, that the instruction was not open to exception.

TORT, under Pub. Sts. c. 112, § 213, for personal injuries caused by a collision of the defendant's engine with a sleigh in which the plaintiff was riding at a grade crossing in Franklin. The declaration contained three counts, the first of which alleged failure to give the signals required by statute, and that such failure contributed to the injury. Trial in the Superior Court, before *Gaskill, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff was riding with one Desjarlais, who was driving, in an open sleigh drawn by a single horse on a highway leading from Franklin towards Woonsocket, and crossing the defendant's railroad at grade. They testified that they approached the crossing about ten minutes past six on the evening of February 2, 1897; that when within twenty-five or thirty yards of the crossing, they stopped and listened; that there were some obstructions which prevented a view of the railroad in the direction from which the train came; that there was no whistle blown and no bell sounded upon the locomotive as the train approached; that they had no bells on their own horse or sleigh; that it was in the country, and there were no sounds to prevent their hearing any noise that might be made; that they started to cross the railroad at the crossing; that when nearly over the crossing they saw the train right upon them; that they did not hear the train until it was upon them; and that it struck the sleigh, causing the injury complained of.

The defendant called several witnesses to prove that the whistle was blown at the usual place, and the bell rung and whistle blown alternately from that place to the crossing. There was evidence tending to show that the whistling post was only 1209 feet from the crossing, instead of eighty rods, as prescribed by the statute.

The engineer of the train testified that he blew the whistle in

the neighborhood of the whistling post, and the fireman testified that the whistle was blown at the whistling post and the bell rung from the time the whistle ceased blowing to and over the crossing. There was evidence that the train was running from thirty-five to forty miles an hour.

The judge instructed the jury that, if the whistle was not blown until the train arrived at a point 1209 feet from the crossing, and the whistle was then blown and the bell rung continuously or alternately to and over the crossing, that would be a violation of the law, and the plaintiff, so far as that matter was concerned, would have made out his case; and that they must also find whether the omission of the signals contributed to the injury.

He then instructed the jury as follows: "If you are satisfied, under this first count, that that whistling post was less than eighty rods from this crossing, and that the first announcement of the whistle or bell was practically at the whistling post, then the burden which must be maintained by the plaintiff has been maintained, and you are entitled to render a verdict for him. If you are satisfied that the failure to give those signals contributed to the injury, and if you find there was not gross negligence on the part of the plaintiff, or the person who was driving him, contributing to the injury, it is entirely within your province to infer from those facts that the failure to give the statutory signals did contribute to the injury to the plaintiff."

To the latter part of the instructions the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding, (*W. C. Mellish* with him,) for the defendant.

H. Parker & C. C. Milton, for the plaintiff, were not called upon.

BARKER, J. The exceptions must be overruled. The portion of the charge excepted to is not open to the construction which the defendant attempts to put upon it, that the jury were told that they might infer from the failure to give the statutory signals alone that that failure contributed to the plaintiff's injury. The charge was given in view of all the evidence, and was to be acted upon by the jury in dealing with all the evidence. There was evidence tending to show that the plaintiff and his com-

panion stopped near the tracks before entering upon them, and listened to ascertain whether a train was approaching. It is possible that at that time, if the law had been complied with by the defendant, the whistle would have been blown or the bell rung, and that the signals would have been heard, notwithstanding the fact that similar signals given after the plaintiff and his companion had started to cross the track were not heard.

Exceptions overruled.

ELIHU CHAUNCEY & another vs. INHABITANTS OF
LEOMINSTER.

Worcester. October 4, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Specific Performance of Agreement to buy Land — Cloud upon Title — Equity.

If an agreement is made for the conveyance of land by a good and clear title free from all encumbrances, it is immaterial how the title has devolved in the past, if the deed tendered is sufficient to convey the full fee in the whole land free from encumbrances and from such clouds as in equity bar a decree for specific performance.

Where the title to a portion of land agreed to be conveyed by a good and clear title free from all encumbrances descends from a deceased person upon whose estate administration has not been taken out, and sufficient time has not elapsed to raise a presumption that administration will not yet be granted, this court will not decree specific performance of the agreement; and the mere failure of the defendant to produce evidence that there are debts against the estate is not enough to show that the risk is so small that he should be compelled to assume it.

BILL IN EQUITY, filed March 31, 1897, in the Superior Court, to compel specific performance of an agreement to buy land in Leominster. Hearing before *Hopkins, J.*, who reported the case for the determination of this court; such decree to be entered as justice might require. The facts appear in the opinion.

H. Mayo, for the defendant.

E. P. Pierce, for the plaintiffs.

BARKER, J. The chief difficulties in the decision of this case arise from the loose way in which it has been conducted, and the manner in which it has been reserved for the determination of

the full court. The bill alleges that the defendant by an agreement in writing, dated August 3, 1896, and set out by copy, agreed to buy of the plaintiffs certain land for a sum named; that the plaintiffs have always been ready and have offered to perform the agreement on their part, and have asked the defendant to perform it on its part; and that the defendant has refused. One term of the agreement set out is that the land was to be conveyed within two months from the date of the agreement, and that the defendant should pay the price on the delivery of the deeds if they conveyed a good and clear title to the premises free from all encumbrances. The bill was filed on March 31, 1897. The answer admits the execution of the agreement, states that the defendant denies that the plaintiffs have a good and clear title to the land free from all encumbrances and will require the plaintiffs to prove title, and states further that there are many defects in the record title which can be cured, if at all, only by a resort to parol evidence and a long and difficult investigation of facts; that the title is not a marketable one such as can be sold to a reasonable purchaser or mortgaged to a reasonable mortgagee, and that it would not be equitable to decree specific performance. A supplemental answer alleges that before the filing of the bill the defendant notified the plaintiffs that it would not accept the deeds tendered, and that since the giving of such notice there has been such a change of circumstances as would make a decree for specific performance inequitable; that at the time of the agreement the defendant's high school building was so overcrowded that it was necessary for the defendant at once to provide additional school accommodations either by erecting a new building for its high school, or building additional houses for the lower grades, and remodelling its high school building for the purposes of its high school; that in June, 1896, the town voted to buy the land for a high school building, and in October, 1896, voted to build a new high school building; that after the plaintiffs failed to furnish a satisfactory title to the land the defendant took no further action towards erecting a new high school, and on March 1, 1897, voted to build two new schoolhouses, which it had built before the hearing before the master, and had remodelled its high school building for the purposes of its high school, and no longer desires to build a new high

school building, and has no use for the land. It does not appear when the supplemental answer was filed, but from the reference in it to the hearing before the master it would seem to have been after that hearing. No replication appears to have been made by the plaintiffs to either answer. At some time the case was referred to a special master. The rule to the master is not set out, but it seems from his report, and from the report of the learned justice of the Superior Court, who reserved the case for the determination of the full court, to have been a rule requiring the master to find the facts, although upon the record the parties were not at issue. It appears from the master's report that he heard the parties on October 22, 1897, and that evidence was put in before him. His report was made on March 30, 1898. No exceptions were taken to it by the parties. The report states no questions as questions of law. There is no order affirming the master's report. The report, which reserves the case for the full court, says that the case was heard and so reserved by the court below upon the pleadings and master's report, but adds that at the hearing the defendant admitted there had been no change in the value, quality, or condition of the land, and no laches on the part of the plaintiffs in clearing the title.

Recurring to the bill, it appears from the agreement that the plaintiffs purported to act in making it not only for themselves but as agents of numerous other persons, who with the plaintiffs are named in it, and are described in it as the party of the first part. None of these other persons are parties to the cause. While the plaintiffs agree to sell the land, neither the bill nor the agreement alleges that the plaintiffs themselves had title to the land, and the agreement is that it is to be conveyed by deeds from its owners, for which deeds the defendant is to pay the purchase price upon their delivery, if they convey to the defendant a good and clear title free from all encumbrances. That part of the first answer, therefore, in which the defendant says that it denies that the plaintiff has a good and clear title to the land free from encumbrances, and will require the plaintiffs to prove their title thereto, is not a denial of any allegation made in the bill or necessary to the case stated by the bill. If it is to be treated as an allegation of a fact in defence, the fact is not material under the bill. The answer does not deny the alle-

gations of the bill that the plaintiffs have always been ready and have offered to perform the agreement on their part, and there is no direct averment by the defendant that the deeds tendered to it by the plaintiffs did not convey a good and clear title to the land. On the other hand, the plaintiffs have not joined issue on the allegation of the answer that there are many defects in the record title to the land which can only be cured by a resort to parol evidence and a long and difficult investigation of facts, and that the title is not marketable.

From the master's report it appears that the agreement was duly made, and the necessary appropriation made by the defendant to provide for the payment of the purchase money. The land consisted of some seventeen and a quarter acres in three contiguous parcels. On September 29, 1896, the plaintiffs tendered deeds which they asserted were sufficient to convey to the defendant a good and clear title to the whole land. At this time the defendant was not in funds to pay the purchase money, and also desired time to make an examination of the title, and it was then agreed that time should be allowed for this purpose, and that in the mean time the deeds should be left with the chairman of the selectmen.

In November following the defendant notified the plaintiffs of certain defects which it asserted existed in the title. The deeds tendered were sufficient in form to satisfy the agreement, and the defendant admitted that they were sufficient to convey good title to two of the three lots constituting the land, but asserted that they were not sufficient to convey a good title to the other lot because the title of the grantors to some fractional interests in this lot came through deceased persons of whose estates there is no record of settlement in the Probate Courts. In fact the plaintiffs as trustees owned fifty-four one-hundredths of this lot, and the defendant admitted the sufficiency of that title, and of the deeds tendered to convey it. As to the remaining forty-six one-hundredths of the lot the plaintiffs asserted that the title was in one Nancy Salisbury at the time of her death in 1865. The defendant admitted that the deeds tendered were sufficient to convey all the title which Nancy Salisbury had at her death, but asserted that her title was defective for want of settlement in probate of the estates of six persons, through whom her title

was derived. These persons were: (1) Lucretia Farley, who died in Hollis, New Hampshire, in 1819, owning one thirty-ninth of the lot, and leaving a husband and four children. (2) Lucinda Gardner, who died at Leominster in 1826, owning twelve one-hundredths of the lot, and leaving as her heirs and next of kin eleven brothers and sisters, and the issue of a deceased sister. (3) Francis Gardner, Jr., who died in 1835, owning thirteen one-hundredths, and leaving a widow and five children. (4) Delia L. Gardner, who died at Boston in 1842, owning thirteen five-hundredths, and leaving a mother and four brothers and sisters. (5) Henry G. Seaver, who died at Boston in 1838, owning thirteen four-hundredths, and leaving three brothers and sisters. (6) Mary Whitcomb, who died at Bolton in 1852, owning one one-hundredth, and leaving two children and the issue of a deceased child.

Nancy Salisbury's title to one one-hundredth of this lot was from the heirs of John Gardner, who died August 26, 1856. After the deeds were tendered to the defendant, and after the defendant had objected that Nancy Salisbury's title was defective because the estates of the six persons named had not been settled in the Probate Court, at some time in the same November the parties ascertained that the deed from John Gardner's heirs to Nancy Salisbury contained no habendum, and operated to convey to her an estate for her life only, so that the title to John Gardner's one-hundredth was then in the persons entitled to claim through his heirs. The master's report does not state that any agreement for an extension of time was made by the parties except the previous one made on September 29, 1896, when it was agreed by the parties that time should be allowed for the defendant to make an examination of title, nor does the report state that the subsequent efforts of the plaintiffs to cure the defect in the title which came through John Gardner were made at the request or with the knowledge of the defendant. Nor does the master's report state that upon the discovery that the deed from the heirs of John Gardner had no habendum, and that one one-hundredth of the lot was not conveyed by the deeds tendered to the defendant, the latter considered the bargain off, and would no longer hold itself bound to take and pay for the land, or that it so notified the plaintiffs.

The plaintiffs did, in fact, in January and February, 1897, procure to one of themselves deeds from twenty-eight persons, who were all the persons who had any interest in the land by descent or by will from John Gardner or those taking under him, and in the latter part of February, 1897, the plaintiffs tendered to the defendant an additional deed conveying all the interest so acquired. The master's report does not state whether the deeds tendered on September 26, 1896, still remained in the custody of the chairman of the selectmen. Upon the making of the tender of the last deed in February, 1897, the defendant objected to the title which the deed purported to convey that it came by descent from persons deceased of whose estates there is no record of settlement in the Probate Courts, and that for that reason the title was insufficient.

John Gardner died at Leominster on August 24, 1856, and there is no record of the settlement of his estate in the Probate Court. There was some evidence before the master that he left a will, but the master finds that he died intestate, leaving as his heirs six children and the issue of a deceased child to whom his title passed by descent. Between John Gardner and the grantor in the deed tendered to the defendant in February, 1897, there were instances in which the title to undivided interests in the lot passed by descent from persons of whose estates there is no record of settlement in the Probate Court. (1) Two children of a daughter of John Gardner, who died before him, inherited from him, in 1856, what would have been their mother's share, or one seven-hundredth part of the lot. (2) One of these children, William G. Thurston, died at Cincinnati, Ohio, in 1877, and his fourteen-hundredth part of the lot descended to his two children. (3) William T. Osgood died at Springfield in 1892, owning one eighty-four-hundredth of the lot, which descended to his only child. (4) J. D. C. Thurston died in New York City in 1894, owning one twenty-eight-hundredth of the lot, which descended to his sister.

Besides this, one forty-two-hundredth part of the lot passed by will of John G. White, who died at Cambridge on September 7, 1896, the affidavit of notice of the appointment of his executrix having been filed on December 1, 1897, or some months after the filing of the plaintiffs' bill; and one seven-hundredth part of

the lot passed by will of Francis Gardner of Boston, who died in 1881, and in whose estate in probate the affidavit of notice of appointment was filed on December 10, 1897; but in each of these cases the affidavit filed showed that notice was duly given within three months after the appointment. There was no evidence of any outstanding or unpaid liabilities of any kind against any of the estates of the persons through whom the title came to the plaintiffs. The lot to the title of which the defendant objected was woodland, and no question or claim of title by prescription was raised before the master. It contained seven acres and was worth \$7,000. The report also finds in substance the facts alleged in the defendant's supplemental answer as to the purpose for which the defendant voted to purchase the land, and its subsequent action in otherwise providing accommodations for its schools.

Assuming that it is our duty upon the case, as it stands, to decide whether the plaintiffs shall have a decree for specific performance, we think that the bill should be dismissed, with costs. Aside from the contention that the last deed was not seasonably tendered, and which we do not consider, most of the defendant's objections are clearly untenable. The agreement did not call for a title every step in which should appear of record. The agreement was for a good and clear title free from all encumbrances, and it was immaterial how the title had devolved in the past if the deeds tendered were sufficient to convey to the defendant the full fee in the whole land free from encumbrances, and free from such clouds as in equity bar a decree for specific performance.

Under our decisions, where the only defence is want of good title, equity will decree specific performance when the title tendered is beyond reasonable doubt, although there are questions in respect to the title which must depend upon circumstantial evidence, and although there may be still the possibility of a defect, and a remote chance that the title may be exposed to litigation and finally held to be imperfect. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400, and cases cited. *First African Methodist Episcopal Society v. Brown*, 147 Mass. 296, 298. *Cushing v. Spalding*, 164 Mass. 287. *Loring v. Whitney*, 167 Mass. 550. *Conley v. Finn*, 171 Mass. 70.

In most of the instances in which the title tendered came through persons whose estates had not been settled in the Probate Courts more than twenty years have now elapsed since the devolution of title by descent, and there was no evidence of the existence of claims of any kind against the estates of the persons from whom the title descended. In the two instances in which small interests in a part of the land passed under comparatively recent wills, the wills were duly probated, and the notices which found the bar of the short statute of limitations were duly given, although the affidavits of the giving of such notice were not filed until after the filing of the bill. There were, however, two instances in which title to a very small interest in a part of the land passed quite recently from persons whose estates have not been brought into the Probate Court for settlement. These were the descent of one eighty-four-hundredth of the seven-acre lot from William T. Osgood to his only child in 1892, and the descent of one twenty-eight-hundredth of the same lot from J. D. C. Thurston to his sister in 1894. The plaintiffs contend that these interests are so minute that the possibility that the title which passed to the heir will be charged with the debts of the ancestor is of no consequence here. We think otherwise. Every tenant in common is seised of the whole land, and may enter upon and use it without committing a trespass. It was the purpose of the defendant in acquiring the land to use it for school purposes, which would make it necessary that the defendant should have the exclusive right of occupation. If the defendant should be compelled to accept the title, it would, as a municipal corporation, be expected to use the land for some public purpose which would require the exclusive right of occupancy. In adverting to this, we do not intimate that we should require any purchaser to accept a deed which failed to convey to him a minute undivided interest when he had bargained for the whole fee.

The title to the share of the seven-acre lot which descended in 1892 from Osgood to his son, and of the share which descended in 1894 from Thurston to his sister, are both subject to a cloud, in that they may yet be taken for the debts of the decedents respectively. While there was no evidence before the master that there were any such debts, there has been no

administration taken out as yet upon the estates, and sufficient time has not elapsed to raise a presumption that administration will not yet be granted. Without administration and the giving of the notice of appointment to show that if there are any claims they must be presently extinguished by the statute of limitations, we think that the mere failure of the defendant to produce before the master evidence that there are such debts is not enough to show that the risk is so small that the defendant should be compelled to assume it.

Bill dismissed, with costs.

MARGARET O'BRIEN & others vs. CITY OF WORCESTER.

Worcester. October 5, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

City—Sewer—Law and Fact—Action—Contributory Negligence—Damages.

A city, in discontinuing a sewer upon building a new one, is bound to proceed with due regard to the fact that the premises of a person are connected with and drain into the old sewer, and if it fails to do so it is liable for the damages resulting to him therefrom, unless there was contributory negligence on his part.

Whether the owner and occupant of premises connected with a sewer in a city knew or ought to have known that a new sewer was being constructed in the street, and was negligent in not connecting his premises with it, are questions of fact for the jury, in an action against the city for damages caused by walling up the old sewer.

If a person whose premises in a city are connected with a public sewer knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built and that the old sewer was walled up, and negligently omitted to connect his premises with the new sewer, or failed to take such measures of prevention or precaution as ordinary prudence would have required, he cannot recover against the city for any damages to which such negligence contributed.

Where a sewer in a city is discontinued and a new one built, if the city walls up the old sewer, causing the water and sewage to set back upon premises connected with it, the owner is entitled to recover for the injury to his estate, including loss of rents and reasonable compensation for his trouble and expense in respect to his property, unless and except to the extent to which by reasonable care and precaution he could have guarded against such injury; but he cannot recover the expense of connecting his premises with the new sewer.

In a joint action by the owners of an estate against a city for injuries caused, upon building a new sewer, by the walling up of an old one with which the estate was connected, they cannot recover for injuries to their health.

TORT, for injuries caused to the plaintiffs' property and health, by the alleged negligence of the defendant in the construction of a sewer. Trial in the Superior Court, before *Gaskill*, J., who allowed exceptions tendered by both parties, those of the plaintiffs being in substance as follows.

In 1890, the plaintiffs were the owners and occupants of a lot of land and house thereon on Bradley Street in the defendant city. The house was duly connected with the city sewer then existing in Bradley Street when the plaintiffs came into possession of it in 1889, and the drainage was good.

It appeared in evidence that in December, 1890, the city constructed a new sewer in Bradley Street past the plaintiffs' property, under a proper order of the city council, parallel with and about four feet distant from the old one, the bottom of the new sewer being about two feet higher than the bed of the old one where that was lowest. While constructing the new sewer the city connected all the houses on the street with it, except the plaintiffs' estate and one other.

There was no evidence that the plaintiffs knew that a new sewer was being constructed, or that their house was not connected, except what inference may be drawn from the fact of the work being done; and the plaintiff O'Brien testified that she did not know what had been done, or what the trouble with her cellar was, until the same was discovered in 1894.

Soon after the construction of the new sewer, the plaintiffs began to have trouble with their cellar. It grew wet and foul-smelling. At times, after a rain, the water would reach the depth of eighteen inches. This accumulation was slimy, and had the appearance of being sewage. The plaintiffs repeatedly went to the city board of health, and to the office of the superintendent of sewers for the city, but no relief was afforded. The condition became such that the tenants in the house moved out, and the plaintiff O'Brien, who has a dower interest, and is mother and also guardian of the other plaintiffs, who are minors, testified that the tenants gave as a reason for moving the foul condition of the cellar.

The same witness testified that applicants for tenements refused to move in on account of the condition of the cellar; that the loss from the tenements standing idle was about \$144;

that it was so damp in the house that the sheets in the beds became damp, and a mould formed on things which were allowed to stand; that her health became very poor; that her physician told her she must move away from the place, and that she would die if she continued to live over such a cellar; that she paid out in doctor's bills between thirty and forty dollars; and that while this condition existed two of her children were taken sick with scarlet fever and died, and two children of the tenants died, one with diphtheria.

A physician was called as a witness, and testified that he attended the plaintiff O'Brien in her illness; that he advised her against living over such a bad cellar; that such a condition of the cellar as had been testified to would aggravate such diseases as scarlet fever and diphtheria, and render them more likely to be fatal in result; and that her condition was such as might have been caused by living over a filthy cellar, and he knew of no other reason for her condition.

In their efforts to dry the cellar, the plaintiffs had plumbers raise the water closets and lay drain pipes through the cellar at a cost of about forty dollars, but it did no good. The cellar steadily became worse, until in 1894 one Knowles, a drainage and sewerage contractor, was called in.

Knowles testified that he found the connection with the old sewer all in order, but that the water would not run off through the pipes into the sewer; that after considerable digging, he found that the house had never been connected with the new sewer; that upon making the connection, the water ran into it, and the cellar became dry and all right; and that the cause of the plaintiffs' cellar being in such a condition was that the sewage from the house could not run off properly, owing to the fact that the city walled up the outlet of the old sewer at some time after the construction of the new sewer.

The plaintiffs claimed no damages except such as resulted after the walling up. The sewage set back in the drains leaked through into the surrounding earth, and was washed into the cellar by rains until the cellar bottom, walls, and surrounding earth became filled with the filth. When Knowles commenced work there were about eighteen inches of dirty water standing in the cellar. His bill for making the connection with the new sewer was \$128, which included also some interior plumbing.

At the close of the evidence, the judge ruled that the plaintiffs could maintain the action, and recover the reasonable expense of connecting their estate with the new sewer. It was agreed by the parties that, under this ruling, a verdict should be rendered for the plaintiffs in the sum of \$100, which was done; and the plaintiffs alleged exceptions.

The exceptions tendered by the defendant were in substance as follows.

There was evidence tending to show that in December, 1882, a sewer was properly constructed in Bradley Street under an order of the city council; that the then owner of the premises, later owned by the plaintiffs, signed, before connecting the premises with the sewer, an instrument applying for permission to lay a service drain from the premises to the public sewer, and agreeing to save the city harmless from any damage consequent upon the doing of the work, and to conform to the rules and regulations relating to the laying of drains adopted by the city council; that the land in and around Bradley Street was very boggy, and covered to a depth of sixty or seventy feet with mud and soft material; that in 1891, by reason of use and the construction of a large drop forge establishment in the vicinity and the increased heavy travel over the street, the sewer had settled from one to two feet in various places; that opposite the house of the plaintiffs it had settled about one foot, and the plaintiffs' house and its foundations had also settled about one foot below what it was at the time of the construction of the first sewer, in 1882; that in 1891 the city council adopted an order for the reconstruction of the sewer; that at this time the sewer was performing its work, but required frequent cleanings, and because of its uneven condition it was deemed best to have it reconstructed; that under that order, and in the months of November and December, 1891, a new sewer was constructed of the same level as the original sewer, and a foot or two away from it; that at that time the city constructed an entrance to the sewer opposite the house of the plaintiffs, and laid a pipe from the new sewer at the lowest grade at which it could be constructed, and dug a trench to within about three feet of the cellar wall of the plaintiffs' house, and the land of the plaintiffs was dug up for this purpose; that at the same time an

engineer of the defendant made measurements and took levels in the cellar of the plaintiffs' house, and determined therefrom that, by reason of the settling of the house and the plumbing connected therewith, it was impossible to connect the plumbing as it then was with the new sewer; that the end of the pipe running into the new sewer, which had been laid from the sewer to within three feet of the cellar wall of the plaintiffs' house was thereupon covered with a board in order that it might not fill up, and the trench recovered; that later, when this trench was connected with the house by Knowles, the house was drained and the trouble removed; that the new sewer was constructed upon piles, and in its construction an engine and other necessary and heavy appliances for driving the piles were in the street for a considerable distance both sides of the plaintiffs' house, and for a period of two or three weeks; that also there was in the street an excavator, which was also operated by an engine, and consisted of a track and a framework several feet above the ground on the top of which ran a pulley carrying buckets which were filled with earth where the digging was going on, and were then run back to the other end of the trench where the filling was being made; that the plaintiff O'Brien knew of the work going on in the street, and lived upon the premises all the time, and saw the engines in operation there; and that the work of constructing the new sewer was properly done.

There were also introduced the following regulations of the board of health of the defendant city, duly adopted in accordance with authority conferred on it by law:

"Rule 1. Every tenement in said city used as a dwelling-house shall be furnished with sufficient drain, underground, to carry off the waste water into a common sewer or reservoir. . . .

"Rule 7. The owners or occupants of estates abutting on a public sewer shall cause such estates to be connected by proper drains with such public sewer."

The evidence also tended to show that, some time after the new sewer was constructed, the city walled up the old sewer without the knowledge of the plaintiffs, and without notice to them; and that, in consequence, the water and sewage set back into the plaintiffs' cellar to the damage of their estate.

The judge ruled that, upon the foregoing evidence, the plain-

tiffs could maintain their action and recover the reasonable expense of connecting their estate with the new sewer, which was agreed to be one hundred dollars ; and the defendant alleged exceptions.

A. P. Rugg, for the defendant.

C. W. Wood & C. H. Wood, for the plaintiffs.

MORTON, J. The defendant was under no legal obligation to the plaintiffs to build or maintain a sewer in Bradley Street. It had a right to discontinue the old sewer and to build a new one, and it was not required to connect the premises of the plaintiffs with the new sewer. Under the regulations of the board of health, which are said in the defendant's exceptions to have been duly adopted in accordance with authority conferred on the defendant by law, it belonged to the plaintiffs to do that. But in discontinuing the old sewer, the defendant was bound to proceed with due regard to the fact that the premises of the plaintiffs were connected with and drained into it, and if it failed to do so, it was liable to the plaintiffs for the damages resulting to them therefrom, unless there was contributory negligence on their part. It is well settled in this Commonwealth that towns and cities are liable for damages caused by their negligence, or that of their servants or agents, in constructing or maintaining sewers, though not for any damages resulting from any defect in the plan or system on which the sewers are built. *Child v. Boston*, 4 Allen, 41. *Emery v. Lowell*, 104 Mass. 13. *Merrifield v. Worcester*, 110 Mass. 216, 221. *Bates v. Westborough*, 151 Mass. 174. *Allen v. Boston*, 159 Mass. 324.

There was testimony tending to show that, "some time after the new sewer was constructed, the city walled up the old sewer without the knowledge of the plaintiffs, and without notice to them," and that the effect of this was to cause the water and sewage to set back into the cellar of the plaintiffs, and to lead to the damages and injuries complained of. The city had no right to do this without taking reasonable precautions to see that the plaintiffs were not injured thereby. The city contends that the plaintiffs knew, or ought to have known, that a new sewer was being constructed, and that they were negligent in not connecting their premises with it. These were questions of fact for the jury. If the plaintiffs knew, or by the exercise of rea-

sonable care ought to have known, that a new sewer was being built, and that the old sewer was walled up, and negligently omitted to connect their premises with the new sewer, or failed to take such measures of prevention and precaution as ordinary prudence would have required, they cannot recover for any damages to which such negligence contributed. The defendant further contends that the sewer was walled up by its employees without its authority. But each bill of exceptions states that the sewer was walled up by the city. The defendant also insists that the plaintiffs violated the rules of the board of health in not entering the new sewer, and for that reason cannot recover. But no rule of the board of health required them, so far as appears, to enter the new sewer. When the old sewer was constructed the predecessors in title of the plaintiffs entered it, and the premises continued to be connected with it till the plaintiffs discovered, as they asserted, that it had been walled up and a new sewer had been built, when they entered the new sewer.

The remaining questions relate to damages. The court ruled that the action could be maintained, but ruled also, in effect, that the plaintiffs could only recover as damages the reasonable expense of connecting their estate with the new sewer, which was agreed to be one hundred dollars, and a verdict for the plaintiffs was rendered for that amount. We think that this was error. If the plaintiffs were entitled to recover at all, they were entitled to recover all the damages to their estate that were the natural and proximate results of the act complained of, and such as reasonably might be supposed to have been within the contemplation of the parties, if, at the time of the doing of the act, they had taken thought of the consequences likely to ensue. *Swift River Co. v. Fitchburg Railroad*, 169 Mass. 326. Applying the rule thus laid down, we think that the plaintiffs were entitled to recover for injury to the real estate, including loss of rents and reasonable compensation for their trouble and expense in respect to their property, unless and except to the extent to which by reasonable care and precaution they could have guarded against such injury. See *French v. Connecticut River Lumber Co.* 145 Mass. 261.

We do not think that the plaintiffs were entitled to recover the expense of connecting their premises with the new sewer.

As already observed, it belonged to the plaintiffs to make the connection. We do not see how the fact, if it was a fact, that the defendant as against the plaintiffs may have walled up the old sewer wrongfully, relieved the plaintiffs from the expense of entering the new sewer, and cast it upon the defendant.

This is a joint action by the plaintiffs as owners of the real estate, and we do not see how they can recover in this action for injuries to their health.

The result is, that the exceptions of both parties must be sustained, and it is so ordered. *Exceptions sustained.*

LEVI W. PHELPS vs. HENRY N. STONE.

Worcester. October 4, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Contract — Statute of Frauds — Original Promise — Finding.

A., having built a store for B.'s father, for which he was paid the contract price, furnished extra work and materials under orders given by B., and upon the strength of promises made by him to A. that he would see A. paid for the same. A. gave credit to B. and charged him with the items, and afterwards saw him about the claim, and B. did not object to paying it, but said he had no money to pay it with. *Held*, in an action by A. against B., that these facts warranted a finding that the bill was for B.'s own debt and not for the debt of his father, notwithstanding the further facts that B. was not pecuniarily benefited, that his father's payments were made at the hands of B., and that the father owned the building.

CONTRACT, upon an account annexed, for work and materials. Trial in the Superior Court, without a jury, before *Hopkins, J.*, who found and ordered judgment for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

A. S. Hudson, for the defendant.

C. F. Baker & *C. F. Worcester*, (*W. P. Hall* with them,) for the plaintiff.

BARKER, J. The plaintiff built a store for the defendant's father, and, having been paid the contract price, brought this action to collect of the defendant a bill for extra work and materials furnished in consequence of conversations between the plaintiff and the defendant. The case was referred to an auditor,

who reported certain facts, and upon them found for the defendant. It was then tried by the court, the auditor's report being the only evidence, the defendant contending that, as matter of law, the court should find for the defendant upon the facts reported by the auditor. The court, however, found for the plaintiff, and the defendant has filed and entered in this court a bill which, although it is irregular, we consider as a bill of exceptions, raising the question whether the court was justified in its finding.

Among the facts found by the auditor his report states that the extra work was performed and the materials were furnished under orders given by the defendant, and upon the strength of promises made by him to the plaintiff that the defendant would see the plaintiff paid for the work and materials so furnished; that the plaintiff gave credit to the defendant and charged him with the items, and that shortly before bringing the suit the plaintiff saw the defendant about the claim, and the latter did not object to paying it, but said he had no money to pay it with. These facts justified the court in finding that the bill was for the defendant's own debt, and not for the debt of his father, notwithstanding the further facts that the defendant was not pecuniarily benefited, and that the father's payments were made at the hands of the defendant, and that his father owned the building.

Exceptions overruled.

LEWIS A. STEBBINS & another vs. THOMAS A. SCOTT,
executor.

Nantucket. October 5, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Judgment — Foreign Law — Corporation — Action — Estate of Deceased
Person — Special Statute of Limitations — Assignment.*

In an action upon a judgment obtained against a corporation in Kansas, the agreed statement of facts upon which the case was submitted recited that the corporation "suspended payment of its debts and deposits"; that a receiver of the corporation was duly appointed by a court of that State; that the assets of the corporation were duly turned into cash and distributed by the receiver among

the creditors; that all its assets were applied to the payment of its liabilities; and that the receiver was discharged about three years after his appointment. *Held*, that it appeared that the corporation "suspended business for more than one year," and never resumed business; and that the Gen. Sts. of Kansas of 1889, §§ 1200, 1204, were applicable to such a case.

The claim of a creditor of a Kansas corporation, who has obtained in that State a judgment against the corporation, which had "suspended business for more than one year," (Gen. Sts. of Kansas of 1889, §§ 1200, 1204,) and brings an action here upon the judgment to enforce the personal liability of a deceased stockholder of the corporation, the executor of whose will was appointed and qualified within two months after such suspension of business and more than two years before such judgment, is barred by the special statute of limitations, Pub. Sts. c. 136, § 9.

Where a Kansas corporation "has suspended business for more than one year," although it has not been actually dissolved, assuming that the creditors have two remedies, one under § 1192, and one under §§ 1200, 1204, of the Gen. Sts. of Kansas of 1889, to enforce the personal liability of the stockholders, they are two remedies for the same cause of action.

If the claim of an assignor in another State against the estate of a deceased person here, as a stockholder of a corporation there, was barred by the special statute of limitations, Pub. Sts. c. 136, § 9, when it was assigned, the assignee cannot escape this bar by bringing a suit against the corporation in the other State, and then bringing an action here on the judgment there obtained; and he shows no cause of action within §§ 13 *et seq.*

CONTRACT, upon a judgment obtained in Kansas. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

H. B. Worth, for the defendant.

E. D. Stetson, for the plaintiffs.

FIELD, C. J. Under the agreed statement of facts on which this case was determined in the Superior Court, the only question submitted is whether or not the special statute of limitations of actions against executors and administrators is a bar to the plaintiffs' claim, etc. The plaintiffs sue here upon a judgment against the United States Savings Bank, a corporation established under the laws of the State of Kansas, recovered in the District Court of Shawnee County in Kansas on October 26, 1895, on which execution issued and was returned "wholly unsatisfied" in November, 1895. The writ in that action was dated August 23, 1895. The plaintiffs are the assignees of certain certificates of deposit issued by the bank to eight different persons, who at different times from December 20, 1890, to July 6, 1891, deposited with the bank the sums of money represented

by the certificates. Each depositor had a separate cause of action against the bank, represented by his certificate.

The bank carried on its business in Topeka, Kansas, and, as appears in the agreed statement, it suspended payment of its debts and deposits in March, 1891, and afterwards resumed payment in July, 1891, and "on September 17, 1891, it again suspended payment, and on September 19, 1891, a receiver of said corporation was duly appointed by the court of Kansas, and thereafter the assets of said bank were duly turned into cash, and distributed by said receiver among the bank's creditors; that the assets of said bank were insufficient to pay in full the claims of the depositors, the last dividend being paid June 4th, 1894; that said receiver applied all the assets of said bank to the payment of its liabilities, and was finally discharged on September 4th, 1894."

Frederick C. Sanford of Nantucket, of whose will the defendant is executor, died on August 13, 1890, leaving a will which was duly proved and allowed in the Probate Court of the county of Nantucket, and of which the defendant was appointed executor on November 10, 1891, and on that date he gave bond according to law, and afterwards he duly published notice of his appointment, and returned affidavit thereof to said Probate Court. The two years of limitation provided in Pub. Sts. c. 136, § 9, therefore expired on November 10, 1893. The writ in the present action is dated October 17, 1896.

Sanford at the time of his death owned twenty shares of the capital stock of the bank, of the par value of two thousand dollars. It is to be noticed that the indebtedness of the bank on which the judgment was rendered in the court of Kansas arose after the death of Sanford, but it has been assumed by the counsel of both parties that the liability of his estate is the same as if the indebtedness on the bank had arisen in his lifetime. We express no opinion about this, but we proceed to deal with the single question which, under the agreed statement of facts, has been submitted to us.

The plaintiffs on November 19, 1892, as attorneys for an association of creditors of the bank, wrote a letter to the defendant as executor of the will of Sanford, calling his attention to the liability of the estate of Sanford to the creditors of the bank,

and requested that he as such executor should pay fifty per cent of the amount of the stock held by the estate towards a fund for the payment of the creditors, but nothing was paid by the defendant on this request. With knowledge of the death of Sanford and the appointment of the defendant as executor, "after the two years period of limitation had expired, the plaintiffs took assignments of the certificates" of deposit, on which they brought the suit and obtained the judgment in the court in Kansas. "On September 20, 1896, the estate of said Frederick C. Sanford not being finally settled, and said twenty shares of the capital stock of said United States Savings Bank being still in the name of said Sanford on the books of said corporation, a decree was made by the Probate Court of [the county of] Nantucket, ordering, under the provisions of the Public Statutes, chapter 136, section 13, the defendant, as executor of said Sanford, to retain funds to satisfy" the judgment against the bank, and "such funds are now being held in obedience to said decree."

We assume, without considering it, that under the laws of Kansas an assignee of the several choses in action against the bank could sue the bank in the courts of Kansas in his own name, and could join in one action claims assigned by different persons. If, however, the claims of the assignors against the estate of Sanford were barred in this Commonwealth when they were assigned to the plaintiffs, the plaintiffs' claim as assignees we think is also barred. The plaintiffs as assignees have no greater rights against the estate of Sanford than their assignors would have had if no assignment had been made.

The contention of the defendant is that by §§ 1200 and 1204 of the General Statutes of Kansas of 1889, which are cited in the margin,* the causes of action of the assignors against the

* These sections are as follows:

"1200. A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business.

estate of Sanford accrued within two years after the giving of the administration bond. Pub. Sts. c. 136, §§ 1, 9. If their causes of action accrued within said two years, then the Probate Court could not lawfully order the defendant to retain assets under Pub. Sts. c. 136, § 13. Whether the causes of action so accrued depends upon the construction to be given to said §§ 1200 and 1204, and to the agreed statement of facts.

We are of opinion that the meaning of the agreed statement of facts is that the bank finally suspended business on September 17, 1891, and that it never resumed business. The agreed facts say that it suspended payment of its debts and deposits; that a receiver of the bank was duly appointed by the court of Kansas; that the assets of the bank were duly turned into cash, and distributed by said receiver among the bank's creditors; that the assets were insufficient to pay in full the claims of the depositors; that all its assets were applied to the payment of its liabilities, the last dividend being paid on June 4, 1894; and that the receiver was discharged on September 4, 1894. We are of opinion that it appears that the bank "suspended business for more than a year" from September 17, 1891. We also are of opinion that §§ 1200 and 1204 of the statutes of Kansas are applicable to such a case, and that after the expiration of said year the creditors of the bank each had a cause of action against the stockholders to enforce their individual liability under the statutes of Kansas. *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kans. 415. The causes of action of the holders

"1204. If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

of the certificates of deposit against the estate of Sanford therefore accrued on September 18, 1892, and they could have brought an action against the defendant as executor at any time from November 10, 1892, to November 10, 1893.

It is argued on behalf of the plaintiffs that the remedy under said §§ 1200 and 1204 was not intended to be exclusive, but that creditors of the bank also had a remedy under § 1192 of the General Statutes of Kansas of 1889, also cited in the margin;* that the plaintiffs had a right to proceed against the corporation in Kansas, under said § 1192, and then bring suit here on the judgment there obtained; that the cause of action declared on in the suit here did not accrue until the judgment had been obtained in the courts of Kansas, and the execution issued thereon had been returned unsatisfied; and that the present action was brought within one year thereafter, as required by Pub. Sts. c. 136, § 14. See *Hancock National Bank v. Ellis*, ante, 39. The argument is that it does not appear that the corporation actually was dissolved by the decree of the court in Kansas; that there is a good reason why the creditors should postpone their action against the stockholders until they had received their dividends from the assets of the corporation in the hands of the receiver; that the creditors could bring suit in Kansas against the corporation at any time within the statute of limitations of that State, and, if thereafter they obtained a judgment there which was unsatisfied, they could bring suit on the judgment against the stockholders as on a cause of action that first accrued after such judgment.

The extent of the liability of the stockholders is substantially

* This section is as follows: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

the same under either of these provisions of the statutes of Kansas, because a stockholder who pays in full the debt of a creditor of the corporation undoubtedly would be entitled to receive the dividends from the assets of the corporation applicable to that debt. Section 1192 of the statutes of Kansas apparently gives a remedy to the creditors to enforce the liability of the stockholders in cases where the corporation has not been dissolved, while §§ 1200 and 1204 give a remedy where the corporation has been actually dissolved, either by a decree of a court of competent jurisdiction or by the expiration of the time limited in the charter. Whether there is any provision in the statutes of Kansas for maintaining a suit against a corporation after it has been dissolved does not appear in the papers before us. Sections 1200 and 1204, however, also make provision for the creditors of a corporation to enable them to enforce the liability of the stockholders where it is shown that the "corporation has suspended business for more than a year," although the corporation has not been actually dissolved. But for this provision the different remedies would, so far as appears, be held applicable to different states of fact, and to be exclusive of each other. In the last mentioned case, however, we assume that each creditor has two remedies to enforce the statutory liability of the stockholders, but they are, we think, two remedies for the same cause of action.

The causes of action against the estate of Sanford, to which the plaintiffs have succeeded by assignment, were in their original form barred by the special statute of limitations before they were assigned to the plaintiffs. We think that the plaintiffs cannot escape this bar by bringing a suit against the corporation in the courts of Kansas, and then bringing an action here on the judgment there obtained. See *Stilphen v. Ware*, 45 Cal. 110. The special statute of limitation of actions against the representatives of the estates of deceased persons was enacted for the purpose of insuring the speedy settlement of the estates. All causes of action which have accrued within the time limited must be prosecuted within that time or they are barred. An executor or administrator has no power to waive the special statute of limitations. *Lamson v. Schutt*, 4 Allen, 359. *Wells v. Child*, 12 Allen, 333. *Robinson v. Hodge*, 117 Mass. 222.

Forbes v. Harrington, 171 Mass. 386. The original causes of action could have been prosecuted against the estate of Sanford within two years from the time of giving the administration bond. We think, therefore, that the plaintiffs show no cause of action within Pub. Sts. c. 136, §§ 13 *et seq.*

The judgment of the Superior Court for the plaintiffs must be reversed, and there must be judgment for the defendant.

So ordered.

GEORGE S. TAFT *vs.* QUINSIGAMOND NATIONAL BANK.

Worcester. October 5, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Liability of Bank as Purchaser of Check.

The purchase of negotiable paper by a bank is as clearly within its legitimate powers as is the collection of such paper by the bank as an agent.

In an action on a check drawn on a bank in another State and deposited by the plaintiff, to whom it was payable, in the defendant bank in W. in this Commonwealth on August 2, 1897, and credited to him upon deposit and afterwards charged back by the bank on his pass-book on November 19, 1897, there was no evidence of usage or custom, or that the defendant informed its customers by notices upon its pass-books or deposit slips or otherwise, that it accepted deposits of commercial paper only as an agent for collection, or that such was its general arrangement with the plaintiff, or that he understood that it was the arrangement ordinarily made by the defendant with its depositors. When the check was deposited, the plaintiff asked the teller when he would hear from it, if not paid by the maker, and was told that it would be three or four days. From September 8, when the defendant first informed the plaintiff of difficulty in collecting the check, until November 19, there were frequent interviews between the plaintiff and the defendant's officers, none of which were decisive in favor of either party; and in this interval the plaintiff knew of the defendant's efforts to find the check, which the drawee never admitted receiving, and to induce the maker to pay it or give a duplicate, and the plaintiff's checks were honored by the defendant at times when his account would have been insufficient to meet them if the amount of the lost check had been charged back; and on October 23 the pass-book was written up without charging back this amount. In the course of mail the defendant's Boston correspondent should have received on August 21, at the latest, notice from the drawee of the reception of the check. *Held*, that the defendant became the purchaser of the check.

CONTRACT, to recover the amount of a check. Trial in the Superior Court, without a jury, before *Gaskill, J.*, who found

"that at least after knowledge by the defendant, on September 8, 1897, that the check in question had not been paid, the defendant treated the same as its property and became a purchaser for value of the same, and by its conduct after such knowledge in other respects, and in balancing the plaintiff's deposit-book without notice or claim to the plaintiff at or prior to that time, of charging him with the amount thereof, it ratified its action in crediting said amount to him, and the same became and was treated by the defendant as an absolute credit to the plaintiff."

The defendant alleged exceptions. The facts appear in the opinion, and in a note thereto by the reporter.

F. P. Goulding, for the defendant.

G. S. Taft, (*H. Parker* with him,) for the plaintiff.

BARKER, J. The action is said by the bill of exceptions to be a suit to recover the amount of a check deposited by the plaintiff in the defendant bank, and credited to him upon deposit, and afterwards charged back by the bank. The declaration has two counts, one for refusal to pay the plaintiff's check drawn upon the defendant, and the other upon an account in which the defendant is debited with the amounts of the plaintiff's deposits, and with the protest fees on his dishonored check, and is credited with the amount of his checks paid by the defendant, the balance being the amount for which, with interest, the court below found for the plaintiff. Whether the bank was indebted to the plaintiff and bound to honor his check depended upon the dealings with reference to the check which he deposited on August 2, 1897, and the amount of which was charged back upon the writing up of his pass-book on November 19, 1897.

The defendant contends that the finding that it became at any time a purchaser of the deposited check was unwarranted. But the purchase of negotiable paper by a bank is as clearly within its legitimate powers as is the collection of such paper by the bank as an agent. The deposit of money by a customer to his credit in a drawing account, without more, creates between the bank and the customer the relation "of debtor and creditor, not of agent and principal." *Carr v. National Security Bank*, 107 Mass. 45. So when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the

transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker. The matter may be regulated by statute, as in the State of New York, or there may be general usages of business obtaining in the locality which color the transaction. So a bank by general notices printed on its pass-books or deposit slips, or otherwise brought to the knowledge of its depositor, or by agreement with the particular depositor as to his own deposits, or by crediting negotiable paper as paper and not as cash, or by a particular contract in any special instance, may define its position as that of agent or purchaser. Usually the cases in which a bank is held to have been only an agent for collection have as a controlling element evidence of usage, or notice, or particular agreement. In the present case there was no evidence of usage or custom, nor was it shown that the defendant informed its customers by notices upon its pass-books or deposit slips, or otherwise, that it accepted deposits of commercial paper only as an agent for collection. Nor was it shown either that such was its general arrangement with the plaintiff, or that he understood that it was the arrangement ordinarily made by the defendant with its depositors.

The conversation between the plaintiff and the teller at the time when the deposit was made is consistent with the theory that the bank took the check as an absolute purchaser, relying for reimbursement upon the plaintiff's liability as indorser if the check should not be paid, or the theory that the bank took the check as a conditional purchaser with the option of retransferring its ownership to the plaintiff upon ascertaining within a reasonable time that the check was not honored upon presentment to the drawee, as well as with the defendant's theory that it took the check as an agent for collection.* It is not disputed that no information was given by the bank to the plaintiff that

* The bill of exceptions recites that "at the time of the deposit of said check, nothing was said by the plaintiff or defendant, except that the plaintiff told the defendant's teller that the check was a collection which he had made for a client, and asked how long it would be before he would hear from the check if it were not paid by the maker; that the teller answered three or four days. At that time the plaintiff was under the impression that the check he deposited was drawn on a bank of Philadelphia, and may have said so to the teller."

there was difficulty in collecting the check until September 8, 1897. From that time until the amount of the check was charged back to the plaintiff in the writing up of his pass-book on November 19, 1897, there were frequent interviews and communications, none of which are decisive in favor of either party, between the plaintiff and the defendant's officers with reference to the check. It seems that, upon the receipt of the check, the defendant sent it to its Boston correspondent, who, having no correspondent near Edgmont, South Dakota, where the bank on which the check was drawn was located, mailed the check in a letter directed to that bank on August 3, and that the drawee has never admitted receiving the letter. Between September 8 and November 19, the plaintiff knew of the defendant's efforts to find the check, and to induce the maker to pay the check or to give a duplicate of it. In this interval the plaintiff's checks were honored by the defendant at times when his account would not have been enough to meet them if the amount of the missing check had been charged back, and on October 23 his pass-book was written up by the bank without charging back this amount. In due course of mail the defendant's Boston correspondent should have received on August 21, at the latest, an answer to its letter enclosing the check to the drawee. It cannot be said that these circumstances show conclusively that the bank took the deposited check as an agent for collection, and the finding that it became a purchaser must stand. This finding makes all questions as to the negligence of the defendant or of its correspondent immaterial. The defendant, having no right to charge back the amount of the deposited check, was a debtor to the plaintiff for money which the latter could recover upon demand, and the refusal to rule that the plaintiff's damages were merely nominal was right. See *Winslow v. Everett National Bank*, 171 Mass. 534.

Exceptions overruled.

QUINSIGAMOND LAKE STEAMBOAT COMPANY *vs.* PHOENIX
INSURANCE COMPANY OF BROOKLYN.

SAME *vs.* PHOENIX INSURANCE COMPANY OF HARTFORD.

Worcester. October 5, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

*Fire Insurance — Permission for Non-occupancy — Waiver — Estoppel
— Evidence.*

A policy of insurance against loss by fire was issued, containing a condition making it void if the property remained vacant for more than thirty days without the assent of the insurer. The premises were leased, and were unoccupied for four months preceding a loss by fire. There was a local board of underwriters, which was a voluntary association of agents of insurance companies doing business in W., the powers and duties of which were purely to establish rates of insurance and classify risks to which rates should be applied. The board kept in each insurance office in W. a card cabinet to which the agents who used the office had access. The cards in these cabinets stated the classification of risks and the rates established by the board, and before a risk was insured the agent was expected to consult the cards for information as to the classification and rate. When the policy in question was written the property had not been classified by the board, no rate had been established, and no card relating to it had been placed in the cabinet; but such classification and rate were made three days later. The insurer had as agent in W. a partnership composed of several members, one of whom was an officer of the board, and he and another member of the firm were present at a meeting of the board when it was voted that "permission be granted, free of charge, for the" property in question "to be unoccupied a portion of the year," a rule of the board requiring a charge for vacancy; and a printed card was issued accordingly and placed in each cabinet, including that in the office of such firm, which knew of the passing of the vote, the issuing of the card, and that it was placed in their cabinet. The action of the board was not communicated to or known by the owner or tenant of the property, neither of whom had applied for a vacancy permit. *Held*, in an action on the policy, that the action of the board was not a permission for non-occupancy, or a waiver of the condition in the policy, and did not estop the defendant from relying on the breach of the condition as a defence.

At the trial of an action upon a policy of insurance against loss by fire, in which a vote of a local board of underwriters, of which the defendant's agent was a member, is relied upon as giving a permit for non-occupancy of the insured premises, evidence of the existence, organization, and action of the board and its relations to the defendant is competent, as is also a lease of the property from the plaintiff to a third person, who was named in the vote.

TWO ACTIONS OF CONTRACT, upon policies of insurance against loss by fire, issued by the defendants respectively in

the sum of \$1,400 each, on the plaintiff's "frame building . . . situate at Woodlawn Grove, Lake Quinsigamond, Worcester." The cases were tried together in the Superior Court, before *Gaskill, J.*

The jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions. The facts appear in the opinion.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the defendants.

W. A. Gile, for the plaintiff.

BARKER, J. The plaintiff by policies in the standard form procured insurance for one year from May 18, 1896, on its hotel. In the description of the property were the words "occupied as a hotel throughout the year." Each policy had a condition under which it would become void if the property insured should become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without the assent in writing or in print of the insurer. The firm of Holt and Irwin were tenants of the insured property.

It was put in evidence by the plaintiff, and was uncontradicted, that from about the middle of November, 1896, the premises were unoccupied. The fire occurred on or about March 23, 1897. The plaintiff put in evidence a vote of the local board of underwriters, passed on November 17, 1896, and a card issued by the board to the insurance agents of the district for which the board acted, and contended that the doings of the board had reference to the insured property, and that this evidence would authorize the jury to find for the plaintiff notwithstanding the breach of the condition as to non-occupancy. Whether this contention was right is the principal question for decision.

From the evidence the jury could find the following facts. The local board of underwriters was a voluntary association of persons who were agents of fire insurance companies doing business in Worcester and Shrewsbury. The board was organized with officers and written by-laws, and held weekly meetings. Its expenses were borne in the first instance by an insurance exchange in Boston, composed of special agents of insurance companies, among which companies were the defendants, and the exchange was reimbursed by the companies. A witness who was secretary of the local board testified that its powers

and duties were "purely to establish rates of insurance; determine the classification to which rates shall be applied; classifying risks to which rates should be applied." The by-laws also show that the functions of the board were to establish rates of insurance below which no insurance should be written on property within the territory of the board, as well as to prevent the fostering of prejudice and the making of misrepresentations against the board or its members, or the insurance companies represented in the board. The board kept in each insurance office in Worcester a card cabinet, to which the secretary of the board and the agents who used the insurance office had access. The cards in these cabinets stated the classifications of risks and the rates established by the board, the cards in each cabinet being of the same tenor. They were prepared by the secretary of the board, in accordance with its action from time to time in classifying risks and establishing rates, and were placed by him in the different cabinets. The drawers of the cabinets were arranged according to streets, and each card represented a risk, classified by the board, and the rate established for it by the board. Before a risk is insured the insurance agent is expected to consult the cabinet, and to get from the card his information as to the classification of the risk and the rate of insurance. The secretary of the board put the cards in their places, and, if a card was in substitution for an old one, took out the old card. The secretary when he put in new cards also left in the office proof sheets, which enabled the insurance agent to know what had been put into the cabinet. Copies of all policies and of vacancy permits issued by the different agents, and of modifications or changes made in policies, passed through the hands of the secretary of the local board. All this is done to protect one insurance company against another, so that when a rate is established it leaves simply a minimum rate at which a policy can be written, and it is not in any way obligatory upon any company to write insurance at that rate. The local board had a rule as to vacancy permits, which was changed at the meeting of November 17, 1896, and which both before and after that change required, unless a contrary provision was made in the rating of the risk, a charge for vacancy after thirty days. The charge after the change was, for one month after the thirty days expired, fifty cents for each hun-

dred dollars of the yearly premium, and for six months seventy per cent of the yearly premium. When the policies in suit were written, the property insured had not been classified by the local board, no rate for insurance upon it had been established by that board, and the board had not placed in the cabinets any card regulating the writing of insurance on the property. The rate at which the policies were written was two dollars upon a hundred for one year, the terms of the policy not allowing the property to be unoccupied more than thirty days, and the risk was classified by the board and given this rating on the third day after the policies were written.

Each of the defendants had as agent in Worcester a copartnership composed of four persons. One of these persons was the vice president of the local board in November, 1896. At the meeting of November 17, 1896, this person and one other member of his firm were present. The firm had signed the articles of association of the board, and one of its card cabinets with the card relating to this risk was then in the office of the firm.

At the meeting of November 17, 1896, the local board passed the following vote: "Voted, that permission be granted, free of charge, for the hotel of Holt and Irwin, Lakeside Inn, to be unoccupied a portion of the year." Thereupon printed cards were prepared by the secretary of the board, of the following tenor:

"Lake Quinsigamond and vicinity, Westside.

Lake Quinsigamond Steamboat Co.

Frame hotel at Woodlawn Grove . . \$2.00

Contents 2.00

Dining pavilion and contents . . . 2.00

Unoccupied a portion of the year.

Nov. 17, 1896."

One of these cards was put by the secretary into each of the card cabinets, including the cabinet in the office of the firm which was agent of the defendants, and that firm knew of the passing of the vote, the issuing of the card, and that it was placed in the cabinet in their office.

There was no evidence tending to show at whose suggestion the vote was passed, or that the action of the local board was communicated to or known by the plaintiff or his tenants. From the description of the insured property in the policies,

the lease from the plaintiff to Holt and Irwin, and the tenor of the vote and card, the jury might well find that the vote and card referred to the property insured. It was not contended that any application for a vacancy permit was ever made by the plaintiff or his tenants to the defendants or their agents, or that any permit was issued, or assent to non-occupancy given, unless the action of the local board amounted to such assent.

The defendants were instrumental in organizing and maintaining the local board, of which, presumably with their knowledge and assent, their local agents were members. Two copartners of the firm which constituted their local agent were present at the meeting of the board which passed the vote, and the firm received the card issued in consequence of the vote. It might be found from this that the defendants were to be charged with knowledge of the action of the local board, and with assent to that action, whatever it might be held to be when properly construed in connection with the circumstances under which it was taken.

In construing the action of the local board one matter to be considered is that the board neither had nor purported to have power either to make or alter contracts of insurance. So far as appears, the board could classify risks and establish and from time to time change rates, and could take measures to prevent the cutting of rates, and the injury of the business by misrepresentations, and other like means; and there its functions stopped. Its actions do not appear to have been intended to be communicated, or to have been in fact communicated, to the persons who might hold insurance upon property situated within the district, or who might wish to purchase such insurance. On November 17, 1896, the plaintiff's buildings, which had been erected in 1895, were under insurance effected on May 18, 1896, for one year. The insured property had not been classified by the board when the policies were written, and no rate had then been established by it for the risk. A rate had been established for it on May 21, 1896, and was that at which the risk stood insured, or two dollars of premium for one hundred dollars of insurance for one year, without permission for non-occupancy for more than thirty days, unless upon the payment of a charge or increased premium for such non-occupancy. It was within the legitimate power of

the board to lower the rate established by it for the property, by allowing permission for non-occupancy to be granted free of charge, and to communicate this change of rate to all the insurance offices connected with the board for the government of all persons in those offices who should have occasion to deal with the risk. This was plainly the whole purpose of the action of the board in passing the vote and in issuing the card. Even if we should assume that the reason of this action by the board was the probability that the property would be unoccupied during the winter, and that the plaintiff would apply to the defendants for their assent to such non-occupancy free of charge, those circumstances taken in connection with the others which must also be considered could not make the action of the board mean more than a change in its rate, under which the defendants could, if they should see fit, grant the plaintiff permits for non-occupancy without requiring him to pay an additional premium or charge for the permits. In other words, the only permission granted by the vote was permission to the defendants and all other insurers to grant vacancy permits free of charge if they chose.

We are therefore of opinion that the action of the board, although known to and acquiesced in by the defendants, was not in itself a permission to the plaintiff for non-occupancy, or a waiver by the defendants of the conditions of the policies relating to that subject. Nor upon the evidence as it stood could the action of the board estop the defendants from relying upon the conceded breach of the condition as to occupancy as a defence to the policies. In the complete absence of evidence that the action of the board was taken at the request or suggestion of the plaintiff or its tenants, or was communicated to or known by them, or that they suffered the property to become or to remain unoccupied, relying upon the vote or other action of the board, or that they for that reason omitted to apply for the assent to non-occupancy for more than thirty days required by the policies, it could not be found that the plaintiff's position had been changed to its detriment by any reliance upon the action of the board as a permission for non-occupancy. An essential element of estoppel was lacking.

There was no error in the admission of evidence. The existence and organization and action of the board, and its relations

to the defendants, were relevant to the issues upon trial, whether permissions for non-occupancy had been given, whether the conditions upon that subject had been waived, and whether the defendants were estopped from relying upon the breach of the conditions. The lease from the plaintiffs to Holt and Irwin was a proper circumstance to be given in evidence to be used in construing the action of the board upon which the decision of the main issues turned.

The instructions to the jury requested by the defendants should have been given,* and the exception to the refusal to give them, and to so much of the charge as was inconsistent with them, must be sustained. *Exceptions sustained.*

A. FRANKLYN HOWLAND & others vs. INHABITANTS
OF WESTPORT.

Bristol. October 6, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Land Damages — Qualifications of Expert.

Whether a person should be admitted as an expert as to the value of land is largely in the discretion of the justice presiding at the trial.

PETITION, filed August 13, 1897, for the assessment of damages caused by the taking of land of the respondent for a town way. At the trial in the Superior Court, before *Blodgett, J.*, the only question open was that of the assessment of damages.

* The instructions requested were as follows:

"1. If the jury find that the property insured was and had been vacant for more than thirty days at and before the time of the fire without the assent of the defendant company as required in the policy and under the statutes, then the plaintiff cannot recover.

"2. The vote of the board of underwriters in no wise modified the contract of insurance as set forth in the policy.

"3. There is no evidence that the agents had any authority to modify the contract."

The jury viewed the premises, and the parties introduced the testimony of expert witnesses upon the value of the land taken and the effect of such taking upon the remaining land.

Among other expert witnesses offered by the petitioners was John A. Macomber, who testified that he had been town clerk of Westport for twenty-two years, and that he had been a member of the Legislature, and, while such, Chairman of the Committee on Towns.

Macomber testified that he was somewhat familiar with the premises from having been through there since the road was built; that he was engaged the previous autumn in appraising an estate located in the vicinity; that his judgment as to what the land was worth in 1897 was based on what he had heard of the sales of adjoining land; that he had known land there probably for thirty years, and had been upon it perhaps once or twice a year, sometimes oftener; that he had heard what land similarly situated, where there were certain cottages in a strip, had sold for; that he knew what certain estates in the vicinity had been appraised for, and that in making his estimate of the land in question he took as a basis of his knowledge partly what land similarly located in the vicinity had been appraised for, and partly what he had learned from viewing the premises.

The judge ruled that the witness was not qualified to testify as an expert, and the petitioners excepted.

The jury returned a verdict for the respondent; and the petitioners alleged exceptions.

H. M. Knowlton & A. E. Perry, for the respondent.

J. F. Jackson & R. P. Borden, for the petitioners.

FIELD, C. J. The exceptions recite that "the jury viewed the premises, and the parties introduced the testimony of expert witnesses upon the value of the land taken and the effect of such taking upon the remaining land." The petitioners also offered, as a witness to the value of the land, John A. Macomber, who was examined and cross-examined in regard to his qualifications as a witness upon the value of the petitioners' land. The presiding justice ruled that he was not shown to be qualified as an expert to express any opinion as to the value of the land taken, and the petitioners excepted to the ruling.

Whether a person should be admitted as such a witness de-

pende largely upon the opinion of the presiding justice as to his qualifications upon the evidence. *Phillips v. Marblehead*, 148 Mass. 326. *Amory v. Melrose*, 162 Mass. 556. *Teale v. Boston*, 165 Mass. 88.

Upon the evidence stated in the exceptions, we do not think that the ruling of the presiding justice should be reversed.

Exceptions overruled.

MICHAEL MEEHAN vs. SPEIRS MANUFACTURING COMPANY.

Worcester. October 7, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Action.

AN action at common law cannot be maintained against an employer for personal injuries occasioned to a workman by an explosion caused by the fumes of naphtha, which was being used, in obedience to an order given by the defendant's superintendent, upon cotton waste in cleaning the inside of a tank, coming in contact with the flame of a lamp which the plaintiff was holding near the tank to enable the men within the tank to see, it not appearing that the naphtha was provided for use in cleaning the tank, although it had been used for cleaning machines.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ, by the alleged negligence of the defendant. Trial in the Superior Court, before *Gaskill, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he had been employed for five years as a day watchman by the defendant at its bicycle factory; that on July 13, 1897, the day of the accident, he was employed with others in cleaning a tank used as a repository for a mixture of lubricating oil and soda water; that about 5.30 o'clock P. M. he was holding a lamp to enable the others to see in cleaning refuse from the tank; that they could not see to work without the lamp; that the men began to wipe the inside of the tank with waste upon which something had been poured that smelled to the witness like kerosene; that suddenly an explosion occurred inside the tank, and the plaintiff was injured; that he

was standing about four feet from the tank at the time of the explosion, which occurred as soon as he detected the odor; that he did not know that naphtha was to be used in cleaning the tank, and did not see any naphtha there until after the explosion; and that he did not know of the danger that the fumes of naphtha would ignite. On cross-examination, the witness testified that he had assisted in cleaning the tank before, and it was one of his duties to clean the tank; that he lighted the lamp; and that he realized there was danger when he smelled kerosene. On redirect examination, he testified that he did not have time between the time when he smelled the kerosene and the explosion to get away.

Frank Granville testified that he was in the employ of the defendant at the time of the accident; that he was instructed by one Blake to take naphtha and clean out the tank; Blake saying, "Take this stuff and clean up the tank"; that he filled a small can, holding about half a gallon, and carried it upstairs; that he had used the naphtha to clean machines, but did not know it was naphtha, and did not know of its dangerous qualities; and that he would not have used it if its dangerous character had been known. On cross-examination, the witness testified that he could not tell whether Blake told him to use the naphtha on the day of the explosion or the day before; that Blake was in and out of the room before the explosion, but was not there at the time of the explosion; and that the plaintiff was there with the lighted lamp.

Irving E. Bigelow testified that he was the treasurer of the defendant corporation, and that Blake was the superintendent. On cross-examination, the witness testified that Blake had full charge of the shop, and hired the workmen, and he could not say whether Blake ever did any actual work himself. On redirect examination, he testified that Blake had no other duty than that of superintendent.

Upon the evidence, the judge directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Gile, for the plaintiff.

H. Parker, for the defendant.

BARKER, J. The action is at common law, with the burden upon the plaintiff to show that the negligence from which he

suffered was negligence for which his employer was answerable. This burden is not met by evidence which is equally consistent with actionable fault of the employer, and with the absence of such fault. At common law a superintendent is for many purposes a fellow servant with the workmen under him, and the employer not answerable to them in case of the superintendent's negligence even in giving an order. The plaintiff must go further, and show that the negligence of a superintendent was in a matter as to which the law imputes his carelessness to the master.

Upon the evidence, the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used. The accident was caused by using naphtha upon cotton waste in cleaning the inside of a tank, when the fumes of the naphtha were liable to explode upon contact with the flame of a lamp, with which the plaintiff standing near by was giving light for their work to men who were within the tank using there the waste and naphtha. The naphtha was used in obedience to an order given by the superintendent. But it did not appear that the naphtha was provided for use in cleaning the tank. It had been used, and we must assume properly used, for cleaning machines, and the only fair inference from the plaintiff's testimony is that other and safe materials had been used theretofore in cleaning the tank.

It was as reasonable to find from the evidence that the superintendent's act in ordering naphtha to be used on this occasion was merely his own choice between safe materials, which he might have directed to be used, and dangerous materials provided for some other but proper purpose, for which choice his employer was not answerable, as to find that in giving the order he was carrying out an intention of his employer to have naphtha used in cleaning the tank.

Exceptions overruled.

MORSE, WILLIAMS, AND COMPANY vs. EDWIN W. ELLIS
& another.

Worcester. October 7, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Mechanic's Lien — Exceptions — Trial — Finding.

No exception lies to the refusal to give a ruling which involves a question of law immaterial in view of the facts as determined by the justice, sitting without a jury.

If the state of the evidence at the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, is such that upon the questions involved the justice, sitting without a jury, is justified in finding either for the petitioner or the respondent, and finds for the latter, his action cannot be disturbed or reversed.

PETITION to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor performed and materials furnished in the construction and installation of two freight elevators in a building in Athol, alleging that the petitioner ceased to perform and furnish such labor and materials on June 2, 1897. Trial in the Superior Court, without a jury, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows.

The petitioner, a corporation engaged in the business of making and installing elevators, on February 16, 1897, contracted with Edwin Ellis and Son, a firm consisting of Edwin W. Ellis and Lois L. Ellis, to furnish and erect in the Ellis Mill in Athol, to be used by them, two elevators according to specifications in the contracts, one of which was to be new and to cost \$350, and the other to be second hand, but of latest pattern and in good order and condition, and to cost \$250.

The work having been completed, the petitioner filed a certificate for a lien on July 1, 1897, claiming the contract price of \$600 to be due, less certain credits and plus a charge of \$4.50 for extra cable locks furnished.

From the evidence it appeared that the Ellis Mill was a new erection, built on the same spot in Athol as a former structure used for a similar purpose, viz. as a sash and blind factory; that Lois L. Ellis was the owner of the mill and the land upon which

it stood, and upon which the lien was claimed, and rented the same to the firm at a fixed price per month; that she was also a partner in the firm of Edwin Ellis and Son, which operated the factory, owning a one half interest, her copartner being her son, Edwin W. Ellis, who had the management of the business, and the care of equipping and rebuilding the mill; that she supposed she was a special partner, but the fact was not established by evidence; and that a contract to furnish elevators was made orally in February, 1897, by one Maclary, the petitioner's Boston superintendent, with Edwin W. Ellis for the firm, and the contracts before referred to were forwarded to Athol.

It was not shown by the petitioner that Lois L. Ellis had any actual or personal knowledge of the making of the contract for the installation of the elevators, or knowledge that the elevators were installed, or that any notice was given to her, as the owner of the property, of the intention of the petitioner to claim a lien for materials before the same were furnished.

It also appeared that the petitioner had the elevators installed so that they could be run, and they were running, as early as March 24, 1897, on which date a bill for the contract price was rendered by the petitioner; that on May 6, 1897, two entire new bushings (which are the inside linings for the pulleys that run on the shafts) were put in, the former bushings being reported to the petitioner by its workman to be loose; and that work was done in June, 1897, after the receipt by the petitioner of the following letter, caused to be written by Edwin W. Ellis, dated May 28, 1897: "We wish you would either send a man up here to fix our small elevator so that it will work or take it out and put in a new one. It has never worked satisfactory and we would like something done about it at once."

It further appeared that the elevators consisted of hoisting machinery bolted to the ceiling, and of a platform that rises and falls in the mill as the machinery is set in motion, and which runs through openings in the floor and is held in place by guide posts nailed securely to the building; that the openings in the floors were closed by automatic hatch doors; that Edwin Ellis and Son were to furnish all help and also lumber for the guide posts, machinery stops, and patent doors; that the lumber was nailed to the building; that there was considerable labor in preparing

the guide posts and lumber; and that all was done under the superintendence of the petitioner.

D. B. Maclary, the petitioner's superintendent, testified that the last work he did was on June 2; that the respondent Edwin W. Ellis stated to him that the elevators were placed in the mill for taking the stock up and down; that the elevator platforms were to be made a special size for some particular stock; and that these elevators were specially adapted to this building, and formed a part of the building.

On cross-examination, the witness testified that, at the time he made the oral contract with Ellis, he did not know who composed the firm, and did not know anything about the ownership of the real estate or plant; that it would be impossible to take out the guide posts without damaging them considerably, but the guide rail could be taken out; and that the elevators could be removed, but he would not say that it could be done without damage to the building or to them.

Frank H. Nowell, a workman in the petitioner's employ, testified that he went to Athol on June 1, and did some work on one of the elevators, which had been reported as running hard, and did not finish his work until the next day, but used no material in such work.

Edwin W. Ellis testified that Lois L. Ellis, who was his mother, had no knowledge of the contracts for the elevators; that the posts were the only portion of the elevators attached in any way to the building; and that repairs were made on the elevators after March 24, the date of the petitioner's bill. On cross-examination, he testified that some of the machinery of the elevators was attached to the building.

Lois L. Ellis testified that, during all the time that she had been associated with her son in the firm of Edwin Ellis and Son, he had had entire charge of the business, and had conducted it without instructions or dictation from her; that he had the sole management and care of rebuilding and equipping the mill, and she had no knowledge, directly or indirectly, of the contracts made by him for that purpose; and that she had no knowledge whatever of a contract with the petitioner for furnishing elevators for the mill, and never heard of such contract until after the beginning of this action.

The petitioner asked the judge to rule as follows:

"1. An elevator attached to a building by nails, bolts, and screws, and applicable to the use for which the building is erected, is real estate.

"2. The owner of property, upon which a mechanic's lien is sought to be enforced for materials ordered by his partner in behalf of a firm of which he is a member, is a purchaser of the materials, within the exceptions of the Pub. Sts. c. 191, § 3."

The court refused to make either of the rulings indicated, but ruled that on all the evidence the petitioner was not entitled to have the lien established, and ordered the petition to be dismissed.

"The petitioner respectfully excepted to the ruling, and to the findings as made, and prays that its exceptions may be allowed."

D. C. Brewer, (*C. T. Davis* with him,) for the petitioner.

S. P. Smith, (*H. L. Parker, Jr.* with him,) for the respondents.

BARKER, J. The only difficulty in dealing with this bill of exceptions is to know what it means. The case was tried without a jury and the petition dismissed. A number of facts which appeared from the evidence are stated, and such further testimony as is material was added at length. Two rulings requested by the petitioner are stated, and the bill then concludes as follows: "The court refused to make either of the rulings indicated, but ruled that on all the evidence the petitioner was not entitled to have the lien established, and ordered the petition to be dismissed. The petitioner respectfully excepted to the ruling, and to the findings as made, and prays that its exceptions may be allowed."

The briefs of both parties and the arguments addressed to us go upon the theory that the question for decision is whether, upon the statement of the facts which it is said appeared in evidence and the additional testimony set out in the bill, it was competent for the court to find for the respondents and dismiss the petition. We therefore construe the bill of exceptions to mean that the petitioner excepted to the refusal to give the rulings requested, and that the statement of the court, that on all the evidence the petitioner was not entitled to have the lien established, and its order that the petition be dismissed, were the findings to which the petitioner excepted. See *Johnson v. Kimball*, 170 Mass. 58.

Therefore these findings are to be dealt with as findings of fact are dealt with, and are to be sustained if founded upon any reasonable view of the evidence. On the other hand, a ruling that, as matter of law, the petitioner was not entitled to have the lien established, could not be supported if upon any reasonable view of the evidence a finding for the petitioner might have been made. Upon this construction of the bill of exceptions, the two rulings requested, the first of which clearly could not be given, might both be properly refused as involving questions of law immaterial in view of the facts as determined by the court. The question whether the petitioner's work and materials were furnished in the erection of the building, or were furnished in putting in machines which were sold as personalty and remained the personalty of the firm which ordered them, as against the owner of the building, depended very little upon how the elevators were attached. If the owner of the building was herself a purchaser of the materials furnished, because of her membership in the firm which ordered them, (see *Fletcher v. Stedman*, 159 Mass. 124,) that principle of law would still be immaterial to the decision if the contract was one for the sale of personalty which did not become part of the building, or if the certificate was not seasonably filed, or if the statement filed was not a just and true account of the amount due.

The state of the evidence was such that upon either of these questions the court below was justified in finding either for the respondents or the petitioner, and as the court did find for the respondents its action cannot be disturbed or reversed.

Exceptions overruled.

INHABITANTS OF DUXBURY vs. COUNTY COMMISSIONERS
OF PLYMOUTH.

Plymouth. October 18, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

Abatement of Tax — Partnership — "Place of Business."

The fact that boards sawed by partners in D., where they own a permanent sawmill, dam, and mill privilege, are box boards, and are mainly used by them in the manufacture of boxes at their box factory in H., does not change the principle that they have a place of business in D.; and the personal property employed in that business is rightly taxed to the partnership in D. under Pub. Sts. c. 11, § 24.

PETITION for a writ of certiorari, praying that the respondents certify their records relating to a certain appeal from an assessment of taxes, to the end that so much thereof as was illegal might be quashed. Hearing before *Barker, J.*, who reported the case for the consideration of the full court, in substance as follows.

The members of the business partnership of Lot Phillips and Company resided in the town of Hanover, where they had a box factory, wherein they manufactured boxes. In the town of Duxbury the firm owned a permanent sawmill, dam, and mill privilege, and in the sawmill they sawed large quantities of logs into box boards, and used the boards so sawed mainly at their box factory in Hanover in making boxes.

On May 25, 1895, the firm made due return of property for taxation, pursuant to St. 1894, c. 294, to the assessors of Duxbury. They were assessed in Duxbury for their real estate situate therein, and also for wood, boards, and slabs at the sawmill. They duly appealed to the county commissioners from the assessment, and so much of the tax assessed upon them for the year 1895 as was assessed upon the wood, boards, and slabs was abated.

If, upon the foregoing facts, the wood, boards, and slabs were stock employed in the business of manufacturing in Duxbury, and the sawmill where the logs or wood were sawed into boards and slabs was a manufactory within the provisions of Pub. Sts.

c. 11, § 20, cl. 1, or if the sawmill was a place of business within the provisions of Pub. Sts. c. 11, § 24, the writ of certiorari was to issue; otherwise, the petition was to be dismissed.

A. Lord, for the petitioner.

H. Kingman, for the respondents.

FIELD, C. J. We are of opinion that the partnership of Lot Phillips and Company had a place of business in Duxbury, and that the personal property employed in that business was rightly taxed to the partnership in Duxbury, under Pub. Sts. c. 11, § 24. If the partners had been accustomed to sell at the mill in Duxbury the boards and slabs which they sawed from logs in the "permanent sawmill, dam, and mill privilege" which they owned there, we should have no doubt that they were engaged in business there within the meaning of the section. The fact that the boards sawed were box boards and were mainly used by the partners in the manufacture of boxes at their box factory in Hanover does not, we think, change the principle. The section provides that, "If partners have places of business in two or more towns, they shall be taxed in each of such places for the proportion of property employed therein." See *Barker v. Watertown*, 137 Mass. 227.

It is unnecessary to consider whether the property was taxable in Duxbury under Pub. Sts. c. 11, § 20, cl. 1.

Writ of certiorari to issue.

WALTER PRATT, assignee, vs. WILLIAM H. MACKEY
& others.

Plymouth. October 18, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

Mortgage — Insolvent Debtor — Statute — Equity.

A mortgage, which comes within the terms of St. 1888, c. 393, providing that "a mortgage of real estate recorded more than four months after its date shall not be valid as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun at any time after the date of the mortgage and before the expiration of one year from the recording thereof," and

which is avoided by an assignee in insolvency of the estate of the mortgagor, is void from its inception, and incapable of being the foundation of any rights in any mortgagee or vendee at a foreclosure sale.

BILL IN EQUITY, filed in the Superior Court, under Pub. Sts. c. 157, § 46, by the assignee in insolvency of the estate of George M. Buck, to redeem land in Brockton from a mortgage. Hearing before *Braley, J.*, who ruled that the plaintiff was entitled to redeem; and, at the request of the defendants, reported the case for the determination of this court. The facts appear in the opinion.

F. E. Sweet & G. W. Folsom, (*H. Kingman* with them,) for the defendants.

L. E. Chamberlain & E. J. Fletcher, for the plaintiff.

BARKER, J. The plaintiff seeks to redeem land from a mortgage given by William Mackey, then its owner, on December 1, 1894, to the Plymouth Savings Bank, assigned by the bank on January 14, 1897, to John F. Mackey, and foreclosed by him on March 11, 1897, by sale to William H. Mackey. The plaintiff was appointed assignee in insolvency of the estate of one Buck, on April 5, 1897, upon proceedings instituted on March 4, 1897; and so, if the Savings Bank mortgage was upon his debtor Buck's estate when it was foreclosed on March 11, 1897, pending the proceedings in insolvency and before his own appointment, he had a right to redeem that estate notwithstanding the foreclosure, it being found that his bill is seasonably brought under Pub. Sts. c. 157, § 46.

The debtor Buck took title to the land on April 16, 1895, subject to the Savings Bank mortgage, and made a second mortgage on May 16, 1896, by deed of that date to William Mackey, which mortgage was not recorded until December 11, 1896, and so was within the language of St. 1888, c. 393, which provides that "A mortgage of real estate recorded more than four months after its date shall not be valid as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun at any time after the date of the mortgage and before the expiration of one year from the recording thereof." This second mortgage was foreclosed on February 11, 1897, by sale to the same William H. Mackey who afterwards, and as before stated, became the purchaser under the foreclosure of the Savings Bank mortgage on March 11, 1897.

The defendants contend that the foreclosure of the second mortgage on February 11, 1897, before the institution of proceedings in insolvency against Buck, deprived Buck of all estate in the mortgaged land, and that therefore no right to redeem the land from the foreclosure of March 11, 1897, made during the insolvency proceedings, is in the plaintiff under Pub. Sta. c. 157, § 46.

So to hold would provide a simple and easy method of avoiding the provisions of St. 1888, c. 393. We think, on the contrary, that every mortgage which comes within the terms of that statute and is avoided by an assignee in insolvency of the estate of the mortgagor must be held to have been void from its inception, and to have been incapable of being the foundation of any rights in any mortgagee or vendee at a foreclosure sale. In no other way can the provision of the statute that the mortgage shall not be valid as against such an assignee be made effectual. The mortgagee and his vendee at the foreclosure sale are charged with knowledge of the statute and of the record which brings the mortgage within the terms of the statute, and can complain of nothing if they deal with a title liable to be defeated by the operation of the statute. As against this plaintiff the mortgage was never valid or operative, and as against him the defendants cannot say that Buck's right to redeem the Savings Bank mortgage was extinguished by the foreclosure of February 11, 1897. See *Harriman v. Woburn Electric Light Co.* 163 Mass. 85. The clear distinction between this case and *Smythe v. Sprague*, 149 Mass. 310, cited for the defendants, is that here the unrecorded mortgage, which if it were operative as against the plaintiff would have extinguished his debtor's title, is made invalid as against the plaintiff, while the unrecorded deed in *Smythe v. Sprague* was valid. So in *Briggs v. Parkman*, 2 Met. 258, the unrecorded mortgage was a valid one as against the assignee, instead of being made invalid by a statute. *Mansfield v. Gordon*, 144 Mass. 168, which holds that an assignee in insolvency cannot rescind a mortgage made by his debtor while a minor, has no application to the present case.

Upon the report, the plaintiff is entitled to redeem, and the case should be sent to a master in the Superior Court to state the account.

So ordered.

SIDNEY O. COBB vs. WILLIAM P. HALE.

Plymouth. October 18, 1898. — January 6, 1899.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

Petition to vacate Judgment — Matter of Law apparent on the Record — Appeal.

A judgment of the Superior Court appealed from must be affirmed, if there is no matter of law apparent on the record which this court can consider under the appeal.

PETITION by the defendant to vacate a judgment. Upon hearing in the Superior Court, before *Mason*, C. J., the petition was dismissed; and the defendant appealed to this court, both from the order dismissing the petition, and from the entry of judgment therein. The facts appear in the opinion.

*W. P. Hale, pro se.**C. B. Snow, Jr., for the plaintiff.*

FIELD, C. J. We infer from the papers before us that the action was originally brought in the Second District Court of Plymouth, where judgment was rendered for the plaintiff, from which the defendant appealed to the Superior Court, and that on March 7, 1898, in the Superior Court this judgment was affirmed on complaint made by the defendant that the appeal had not been properly entered, and that the proper papers had not been filed. Pub. Sts. c. 155, § 34; c. 154, § 39. St. 1898, c. 396, § 30. The defendant on March 18, 1898, filed in the Superior Court a petition asking that the judgment be vacated, which "upon hearing" was dismissed on March 28, 1898, and the defendant on April 4, 1898, appealed to this court. It does not appear on what ground the Superior Court dismissed the petition, nor what appeared to that court on the hearing to be the facts. There appears also an appeal by the defendant to this court from the judgment rendered in the Superior Court. There is no matter of law apparent on the record which this court can consider under either appeal. Certainly no error of law appears in the record before us.

Petition dismissed, and judgment affirmed.

JOHN CARLSON vs. LYNN AND BOSTON RAILROAD COMPANY.

Essex. November 1, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Street Railway — Due Care.

Where a street railway ran upon the right hand side of a highway laid out over marsh land, there was a footpath for travellers on the right hand side only of the track, and a wooden fence on the right hand side of the path. A., who was walking on the path in a dark night, the road being muddy and the wind blowing from the sea in his face, stopped twice within a distance of less than seven hundred feet, looking and listening to see and hear if anything was coming, and saw and heard nothing. At a point from two to three hundred feet beyond the place where he last looked, he was struck and injured by a car going in the same direction at the rate of twenty to twenty-five miles an hour, where there was a space of about twenty inches between the car and the fence. The way was not lighted, the headlight of the car was a small kerosene lamp, and he did not hear any sound before he was struck; the car went from one hundred to one hundred and twenty feet after it struck him, and the motorman was facing to the left and talking with a passenger. *Held*, in an action by A. against the railroad corporation for his injury, that there was evidence of due care on his part.

TORT, for personal injuries occasioned to the plaintiff by being struck by one of the defendant's cars. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

The evidence tended to show that the defendant's cars, while running from Chelsea to Lynn, passed upon a highway laid out over the marshes; that upon a portion of the highway the defendant's tracks were on the left hand side of the road as one proceeds towards Lynn; that about two hundred feet before reaching that part of the turnpike which bridges a creek, being the same in its surface structure as all other portions of the turnpike, (there being no wooden bridge or draw across the creek,) there was a crossover in the road, so that the cars while going to Lynn passed from the left hand side to the right hand side of the road; that after the track passed over to the right hand side of the road it was laid out over that part of the turnpike which bridges the creek and along the highway to Lynn; that after passing beyond that portion of the turnpike crossing the creek, there was a beaten path at the right of the

track which lay about midway between the track and a wooden fence at the right of the track over which persons were in the habit of walking in going to and from Lynn; and that the distance between the fence and the right hand rail of the track was about two feet and nine inches at a point three hundred feet from the bridge, so called, and at a point about three hundred and fifty feet from the bridge the distance between the fence and the right hand rail was about three feet and a half, so that when a car with an overhang of thirteen inches passed the point on the path three hundred feet from the bridge there were twenty inches between the fence and the body of the car, and varying from twenty to twenty-nine inches up to the point three hundred and fifty feet from the bridge.

The plaintiff testified that the accident happened somewhere about three hundred feet from the bridge.

The evidence further tended to show that along this highway over the marshes the defendant had only one track, with turnouts at different places in the road, which was straight and level; that there were no trees upon the highway and no obstructions; that the plaintiff, in the evening of August 5, 1898, about fifteen minutes past nine o'clock, started to walk with a friend named Keeney from Chelsea to Lynn; that they walked upon the right hand side of the highway in the path all the way; that the road was muddy, and the night dark and cloudy, and the wind blew strongly from the water in their faces as they walked along; and that there was no path on any other portion of the way, and no sidewalk on any portion thereof other than the path.

The plaintiff testified that when he approached the crossover, he looked back and listened to see and hear if there was anything coming; that he did not see or hear anything, and walked along; that when just across the bridge he looked back again to see if anything was coming; that he saw and heard nothing; that when he so looked back he was about fifty feet on the Lynn side of the bridge; that Keeney at that time was near and behind him; that he continued to walk along, and the next thing that happened was that something struck him on the outside of the left thigh; that when he was hit he was from two hundred to three hundred feet beyond the place where he last looked back;

that he was struck by one of the defendant's cars going in the same direction in which he was going; that when he was hit he was facing towards Lynn; and that after the car hit him it ran thirty-five to forty yards beyond him.

On cross-examination, the plaintiff testified that he knew that in the night time an electric car generally carried a headlight; and that the car was generally lighted with electricity, so that the body of the car was light; that he knew that electric cars usually made a buzzing sound when they went along the road; and that he did not hear any such sound before the car struck him.

The plaintiff further testified that the last time when he looked around he was with Keeney; that at this time and after looking around Keeney stopped to light a pipe, and the plaintiff went ahead; that the plaintiff, when he was hit, was about two hundred feet ahead of Keeney; that Keeney did not call to the plaintiff to look out, and did not in any way notify him of the approach of the car; and that after the accident he saw that the headlight of the car, which was a small kerosene lamp, was lighted, but he did not see it before the accident.

The evidence further tended to show that at the left of the track there was an open space or roadway twenty or thirty feet in width upon which there were no railroad tracks; that at the time of the accident there were no carriages or conveyances upon the highway at the place of the accident other than the car; that at that time of night it was customary for carriages to be on the highway and for people to walk thereon; that the highway over the marshes was not lighted by any street light or other lights; and that the crossover in the road was from six hundred and seventy to six hundred and eighty feet from the place of the accident.

Ellsworth G. Keeney, a witness called by the plaintiff, testified that he walked from Chelsea on the night in question with the plaintiff, and a few feet behind in the path along the right hand side of the turnpike; that when they arrived at the crossover upon the highway they both stopped and looked back towards Boston to see if any car was coming, but saw and heard nothing; that after so looking they started along and crossed over the bridge, so called; that the plaintiff was ahead and he

about eight or ten feet behind ; that then both he and the plaintiff stopped and looked back to see if a car was coming, and to listen ; that up to that time he had heard and seen nothing ; that thereafter the plaintiff started along, and the witness stopped to light his pipe ; that as he lit his pipe he was standing with his back to the track and his face towards the fence, with his feet upon the pathway ; that while lighting the pipe the wind was blowing from the northeast diagonally across the highway ; that he stood there about a minute lighting his pipe ; that he looked back again and did not see or hear anything ; that the next thing he heard was a car going by him ; that he had not heard its approach, and had heard no gong ; that he did not draw back, and the car did not hit him ; that the next thing he heard after the car whizzed by was the crying out of a man ; that he started to go to him and found it was the plaintiff ; that the car was at that time forty yards or more ahead of the plaintiff ; and that when the car passed him it was going at the rate of about twenty-five miles an hour.

On cross-examination, the witness testified that he did not call to the plaintiff, because he did not have time ; that he heard no noise except the buzzing noise made by the car ; and that he thought that the plaintiff could look out for himself, and so he thought there was no need to warn him.

One Loynes, a witness called by the plaintiff, testified that, at the time of the accident, he was standing upon the front platform of the car, to the left and a little behind the motorman ; that shortly before the accident the motorman's face was turned toward him, and he was conversing with the motorman ; that while he was talking with the motorman he saw a dark object about six feet in front of the car ; that he then pointed towards it and exclaimed, "What is that?" that the motorman and he were at that moment looking at each other ; that the witness was facing toward the right, and the motorman was facing toward the left ; that immediately the motorman turned and tried to set the brake, struck the gong, and said, "I have run over a man" ; that he attempted to stop the car, which struck the object that proved to be the plaintiff ; that the witness went back about thirty yards, and found the plaintiff and Keeney ; and that the car at the time of the accident was going at the rate of

twenty to twenty-five miles an hour, and when it went over the crossover in the road was going at the rate of fifteen miles an hour.

On cross-examination, the witness testified that the motorman, while the car was going over the crossover, rang the gong, possibly twice; that he noticed that the gong had rung many times as the car was going across the marsh; that as the car proceeded along to the place of the accident it made the ordinary buzzing noise, and one could have heard it a long way off had he listened; that the conductor had been riding inside the car and was inside the car at the time of the accident; that the conductor was thrown down when the motorman tried to stop the car; that the discovery by the witness of the shadow and his exclamation, and the striking of the plaintiff by the car, with the movement of the motorman, all happened as quick as a flash; and that at the time of the accident he was alone on the front platform with the motorman.

One Connelly, another witness called by the plaintiff, testified that he was on the car, which was going from fifteen to twenty miles an hour, nearer twenty; that he saw Loynes and the motorman apparently engaged in conversation, Loynes being at the left of the motorman, and the motorman turning towards Loynes; that this was their position at or about the time of the accident; that the first thing he noticed was a sudden jar; and that there was no slackening of the car before the jar was felt, and no gong was struck.

On cross-examination, he testified that he did not think one could walk in the beaten track of the path facing towards Lynn and not be hit by the car, but that the path was wide enough if the person walking therein stepped a little to one side towards the fence; and that a person could stand there in the path facing Lynn when the car came along and it would not strike him.

Two other witnesses for the plaintiff, both of whom were on the car at the time of the accident, corroborated, in substance, the testimony of Connelly.

The motorman testified that, as his car proceeded along the highway over the marsh, he rang his gong at frequent intervals; that when the car passed over the crossover in the road he rang the gong, and the car was then going at the rate of about three

miles an hour; that after the car passed the crossover it was going from eight and a half to nine miles an hour; that while the car was proceeding from the bridge to the place of the accident he was not talking with anybody, but his face was turned towards the front and he was looking ahead; that he first saw the plaintiff about twenty or twenty-five feet ahead of the car; that he immediately tried to stop the car by throwing the reverse and setting the brake, but that it was impossible to stop the car before it hit the plaintiff; that immediately upon seeing the plaintiff ahead of the car he called to him; and that as he called the plaintiff stepped to the right, but did not step sufficiently far for the car to clear him.

Upon cross-examination, the motorman testified that it was customary for express and grocery teams to pass over the turnpike at this time of night; that he was a spare hand, and had been employed but a few weeks by the defendant, and had made this trip five or six times only at this time of night; that he knew that this path was constantly used by people in walking to and from Lynn; that he called to the plaintiff so as to be heard a hundred feet away; and that the car proceeded sixty feet or more after it hit the plaintiff.

The conductor testified that he himself was a spare hand, and had been over the road about half a dozen times before the accident; that at the time of the accident he was riding inside of the car standing up, and the first thing which he noticed was the sudden jerking of the car, which was so violent as to throw him down, and substantially at the same time the car went over an object; that somebody said that they had run over a man, and he heard nothing else; and that the car went seventy-five or a hundred feet after it struck the plaintiff before it stopped.

At the close of the evidence, the defendant requested the judge to rule that, upon the evidence, the plaintiff could not recover. The judge refused so to do; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. I. Badger, for the defendant.

F. D. Allen, for the plaintiff, was not called upon.

FIELD, C. J. The single exception is to the refusal of the presiding justice to rule that the plaintiff could not recover.

The counsel for the defendant in his argument before this court concedes that the evidence warranted the jury in finding negligence on the part of the defendant, but he contends that there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. There was evidence that the plaintiff was walking in the only path or walk in the highway which was intended for travellers on foot, and which it was customary for people to walk in; that the night was dark, the road muddy, and the wind blowing from the sea in his face as he walked along; that the plaintiff listened to hear if anything was coming and heard nothing, and within a distance of less than seven hundred feet turned round twice and looked to see if anything was coming and saw nothing; that when he was hit by the car he was from two to three hundred feet beyond the place where he last looked. The track of the defendant at the point where the plaintiff was injured was on the right hand side of the highway in going from Chelsea to Lynn. On the right hand side of the track was the path for foot travellers, and on the right hand side of the path was a wooden fence. Between the side of a passing car and the fence at the place where the plaintiff was injured was a space of about twenty inches. The car was going from twenty to twenty-five miles an hour. There was evidence that the headlight of the car was a small kerosene lamp; that the highway was not lighted; and that the cross-over of the track from the left to the right hand side of the highway was about six hundred and seventy to six hundred and eighty feet before the place where the plaintiff was injured. The car after it hit the plaintiff went a considerable distance beyond — estimated from seventy-five to one hundred and twenty feet — before it was stopped. There was evidence that almost up to the time of the accident the motorman was facing to the left hand side of the highway, and not to the right. The evidence of the plaintiff's conduct, as testified to by himself and by his companion Keeney, seems to us evidence of due care on his part. The speed and manner in which the evidence showed that the car was run, on a dark night on a track so near to the path for foot travellers, made travelling on the path under the circumstances shown dangerous for even careful persons.

Exceptions overruled.

JOHN H. HARRISON vs. ALICE DOLAN.

Essex. November 1, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

*Writ of Entry — Title by Adverse Possession — Effect of Tax Sale —
Conveyance of Tax Title to Disseisee.*

The effect of an open adverse possession of land under a claim of right for twenty years is not affected by a sale and conveyance of the premises for taxes during that time, followed by a quitclaim of the tax title to the disseisee before St. 1891, c. 854.

WRIT OF ENTRY, to recover possession of a parcel of land in Lynn. Trial in the Superior Court, without a jury, before *Sheldon, J.*, who found for the tenant; and the demandant alleged exceptions. The facts appear in the opinion.

F. S. Hesseltine, for the demandant.

H. T. Lummus, (*J. F. Quinn* with him,) for the tenant.

HOLMES, J. This is a writ of entry. The defence is the statute of limitations. It was found by the judge who tried the case that the tenant had been in open adverse possession of the land in question under a claim of right for over twenty years, and had gained a title, unless the possession was interrupted by a sale and conveyance of the premises for taxes in 1883, followed by a quitclaim of the tax title to the demandant in 1884. The judge ruled that the possession was not interrupted, and ordered a judgment for the tenant. The foregoing facts present the only question. For although the bill of exceptions states that it was in evidence that the demandant "on one or two occasions had come to the tenant and claimed that she was occupying his lot, but was informed by her that she was on Lot 12, and that Lot 13, his lot, was next adjacent to hers," the finding of the court must be taken to mean that the tenant's possession was not disturbed, and that there was no fraud, mistake, or disclaimer affecting the rights of the parties, if indeed any inference of disclaimer, fraud, interruption, or material mistake would have been warranted by the evidence, supposing it to have been accepted in the fullest sense. See also Pub. Sts. c. 196, § 8. The tenant manifested her intent to main-

tain possession of the *locus*, even if she did it under a mistaken description. *Præsentia corporis tollit errorem nominis*, identification by the senses overrides description, as in many other cases in the law. *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15, 33. *Emery v. Seavey*, 148 Mass. 566, 568, 569. Wood, Limitations, (2d ed.) § 263. See *Edmunds v. Merchants' Despatch Transportation Co.* 135 Mass. 283, 284; *Finch's case*, 6 Co. Rep. 63, 65 b.

We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole twenty years, and that the question saved is whether what otherwise would have been the effect of the adverse possession was prevented by the tax deed. Adverse possession is pure matter of fact, to be interrupted only by interrupting the possessor's exclusion of adverse claimants, an abandonment of his claim, or a change in his intent. Whether the last two would have any effect unless they were manifested, we need not consider. In general also the effect of the adverse possession will not be abridged by a change of title. The adverse possessor *ex hypothesi* is a wrongdoer until the twenty years has elapsed. Commonly at least, if not necessarily, his claim is adverse to all the world, and probably any dealings among the excluded parties, even when a deed by a disseisee is valid, would not affect him. Probably the purchaser would only stand in his seller's shoes. See *Chapin v. Freeland*, 142 Mass. 383, 387. At all events, the action of the original disseisee would be barred.

When it is held that the disseisor's possession must be continuous in him and his predecessors in title during the whole time of limitation, and when the statute does not run against the State, it may be held that the statute has not run if the State has had the title during a part of the time relied upon. *Armstrong v. Morrill*, 14 Wall. 120, 145. *Braxton v. Rich*, 47 Fed. Rep. 178, 188. *Hall v. Gittings*, 2 Har. & J. 112. But such decisions have no application to this case, if for no other reason, because the statute runs against the Commonwealth as well as against private persons, (Pub. Sts. c. 196, § 11,) and because, further, the Commonwealth never had even a momentary title to the land.

Again, the intimation in *Abbott v. New York & New England*

Railroad, 145 Mass. 450, 460, has no bearing. That intimation concerned the acquisition of a right of way across a railroad, and was to the effect that a user begun across a three-rod location would be interrupted in its operation by a later taking of five rods. In such a case, the wrongdoer has no possession. He merely commits a series of trespasses. Whether the acquisition and implied assertion of right on the part of the railroad company by a location be or be not sufficient to interrupt the running of prescription, (see *Powell v. Bagg*, 8 Gray, 441, and *Brayden v. New York, New Haven, & Hartford Railroad*, ante, 225,) the determination cannot help us in dealing with the effect attributed by statute to allowing one's self to remain disseised for twenty years.

As there was not even a momentary possession under the tax deed, it is not necessary to consider whether the words and meaning of the statute would not bar a disseisee at the end of twenty years if he had been continuously kept out by a succession of disseisins, one upon another, beyond remarking that there is no analogy between this case and the attempted acquisition of an easement by prescription, where successive users of a way without right are merely successive trespassers except in those cases where by the doctrine of privity the later wrongdoer can add the time of his predecessor's adverse use to his own.

A more subtle argument than those which we have dealt with may be suggested. It may be said that, as a tax sale, if valid, gives a good title as against all the world, it is like prescription, and really begins a new title which can be barred only by twenty years of adverse holding after the new title begins. But we are not driven to consider this argument, because if it prevailed it could do the demandant no good. The tax purchaser was disseised by the tenant's continued adverse possession, and his deed to the demandant before St. 1891, c. 354, conveyed no title as against the tenant. *Faxon v. Wallace*, 98 Mass. 44, 45. *McMahan v. Bowe*, 114 Mass. 140. In *Daveis v. Collins*, 43 Fed. Rep. 31, 33, 34, where the jury were instructed that a sale for taxes would break the running of time in favor of the disseisor, it seems to have been assumed that the conveyance of the tax title to the demandant was good. It is stated that the plaintiff was "clothed with whatever title passed by these tax

deeds." If the conveyance of the tax title to the plaintiff was bad, then, since the very meaning of the statute of limitations is to bar liability for a wrong, and as the disseisin was a wrong to the demandant before the sale for taxes as much as afterwards, if not more so, and was the same wrong, we do not perceive any ground in the tax sale, taken by itself, to prolong the demandant's right of action.

If the conveyance of the tax title to the demandant were good as against the tenant, it might be necessary to consider whether a tax sale is adverse, and, as in the case of a title by disseisin or prescription, creates no privity with former owners, or whether, although it takes all titles, it conveys them in privity like a sale on execution. Pub. Sts. c. 12, § 38. The question is not decided by *Langley v. Chapin*, 134 Mass. 82. Even if the former view were taken, it still possibly might be held that no mere change of title except one which puts it where it is above the statute, as apart from statute, when the State itself takes the title, can prevent the gaining of a later title which also is adverse to all the world, and is the result of an adverse holding uninterrupted in fact for twenty years. Upon these points we express no opinion.

Exceptions overruled.

WILLIAM S. JOHNSON *vs.* WILLIAM A. KIMBALL,
administrator.

ANNIE JOHNSON *vs.* SAME.

Essex. November 1, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Auditor's Report — Trial — Exceptions — Action — Contract — Gratuity.

A judge, sitting without a jury, is not bound by the report of an auditor, but has a right to find according to his own belief upon all the evidence.

If a bill of exceptions contains certain rulings and findings of the judge, sitting without a jury, followed by a statement that he also ruled that, as matter of law, upon the whole evidence, the plaintiff could not recover, such statement will be taken to mean that he ruled upon the evidence and the specific findings previously set forth.

In order to recover against an administrator for payments or services in his intestate's life, the latter's consent or ratification or some arrangement with him must

be shown, and to recover for the funeral expenses of the intestate's wife and for services rendered to her, it must be shown that they were incurred or rendered upon the credit of the intestate, or with the intent to collect the expenses or for the services from him or his estate, or that he promised to pay the plaintiff.

If A. chooses to do a service to B.'s advantage, which A. means to be gratuitous and which B. knows nothing about, the law does not force a complete or inchoate contract upon A. without the consent of either party, even in a case where B. is relieved of a duty and A. has the power to bind him if he chooses.

TWO ACTIONS OF CONTRACT, against the administrator of the estate of James Johnson, the first being to recover money paid for taxes and repairs upon the intestate's real estate, and for the funeral expenses of his wife; and the second being for services rendered to the latter. The cases were tried together in the Superior Court, without a jury, before *Bond, J.*, who found for the defendant in each case; and the plaintiffs alleged exceptions, which appear in the opinion.

F. H. Pearl, for the plaintiffs.

H. J. Cole, for the defendant.

HOLMES, J. 1. The first of these actions is brought by a son against the administrator of his father's estate, to recover sums of money paid for taxes and repairs upon his father's house, and for the funeral expenses of the plaintiff's mother. The second action is brought by the wife of the plaintiff in the first suit, to recover for services rendered to her husband's mother. At the trial, which was without a jury, the plaintiffs relied upon reports of an auditor, but a considerable amount of evidence going to the merits of the case was introduced, of which it is enough to say that it warranted a finding for the defendant. The judge was not bound by the auditor's report, but had a right to find according to his own belief upon all the evidence. *Peaslee v. Ross*, 143 Mass. 275.

2. The plaintiffs asked for rulings that they were entitled to judgment. These are disposed of by what we have said. In the first case the judge ruled in effect that to recover for payments or services in the intestate's life his consent or ratification or some arrangement with him must be shown, and that to recover for the funeral expenses of the intestate's wife it must be shown that they were incurred upon the credit of the intestate, or with the intent to collect them from him or his estate, or that the intestate promised to pay the plaintiff. The judge added, that

he was not satisfied on the evidence that any of the facts required by the rulings existed. In the second case, the judge ruled in effect that the services sued for must be shown to have been rendered on the credit of the intestate, or with intent to collect for them from him or his estate, or that he promised to pay for them, adding, as before, that on the evidence he was not satisfied of the facts required by the rulings.

These rulings and findings seem to have been submitted to counsel in the handwriting of the judge, as they are in quotation marks. Then there follows in each case a statement not in quotation marks, and presumably first reduced to writing when the bill of exceptions was drawn, that the court also ruled that, as matter of law, upon the whole evidence the plaintiff could not recover. We think it only reasonable to read this last broad statement as made subject to what had gone before, and as meaning that the court ruled upon the evidence and the specific findings previously set forth. If we read the general ruling in this sense, the only question necessary to consider is whether the previous rulings were correct. We see no trouble with them as applied to the aspects presented by the evidence. They require the plaintiffs to establish some ground of legal obligation. It was possible, and on the evidence even may be called probable, that the plaintiffs did what they did without thought of reward, as acts of kindness or of remote advantage to themselves, — at all events as pure gratuities. They lawfully might have done so, and, if they did, they had no case, because an executed gift is neither consideration for an express contract nor a ground for implying one as a fiction of law. This is the chief meaning and emphasis of the rulings. They were not intended to exhaust all possible cases of legal obligation irrespective of the evidence, nor were they intended to state any presumption of fact such as that upon which the court was divided in *Guild v. Guild*, 15 Pick. 129. See *Kirchgassner v. Rodick*, 170 Mass. 543, 546; *Williams v. Williams*, 132 Mass. 304, 307; and as to presumptions, *Leighton v. Morrill*, 159 Mass. 271, 278. If the rulings do by implication lay the burden of proof, according to the settled understanding of that phrase in Massachusetts, upon the plaintiffs, they are right, because, whatever the presumptions, the burden must be upon the plaintiffs to prove that what they seek to recover for

was furnished as a consideration for a legal obligation. *Phipps v. Mahon*, 141 Mass. 471. *Starratt v. Mullen*, 148 Mass. 570. *New Bedford v. Hingham*, 117 Mass. 445. *Delano v. Bartlett*, 6 Cush. 364, 366. There is nothing in the decision, nor, as we understand it, in the language, of *Burten v. Shannon*, 14 Gray, 433, 434, contrary to what we now decide.

It is suggested that, even if the plaintiffs intended their services to be gratuitous, they could not achieve their intent without the consent of the intestate, and that they did not get his assent as he had disappeared. As to the services in looking after his place, it might perhaps be found that he assented in advance. The services to his wife, and burying her, were not necessarily done as services to him. But further, while it is true that you cannot pass a title to another without his consent, it is not true that if you choose to perform services to his advantage which you mean to be gratuitous, and which he knows nothing about, the law forces a complete or inchoate contract upon you without the consent of either party, even in a case where he is relieved of a duty and you have the power to bind him if you choose. There is no title to pass. The work is done and the benefit of the work has accrued. If the work is done without intent to be paid for it, the law leaves the parties where they are, and does not give it the character of a compulsory consideration in case you afterward change your mind.

Exceptions overruled.

REBECCA C. FROST *vs.* JANE COURTIS & another.

Essex. November 1, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Partition — Amendment — Instructions — Adverse Possession — Conveyance by Tenant in Common — Estoppel.

After a verdict had been directed for the respondents in a petition for partition of two parcels of land in the Superior Court, the case was reported to this court upon the terms that, if the ruling was right, judgment was to be entered on the verdict, and if the ruling was wrong, the verdict was to be set aside and by agreement of parties a new trial granted to try the issue of title by prescription of one

of the respondents. A rescript of this court directed that the verdict should be set aside and the case stand for trial on the issue whether that respondent had acquired a title by prescription. At the second trial in the Superior Court, the respondents were allowed to amend the answer, setting up as a defence that the petitioner was estopped from claiming any interest in one of the parcels adverse to the other respondent or any person claiming under him. *Held*, that the court had power to allow the amendment.

No exception lies to the refusal to give an instruction in the language requested, if it is given in substance.

The adverse possession of a grantee of one tenant in common of land may be tacked to that of the latter before the conveyance, and if together they equal twenty years the defence of title by prescription to a petition for partition by the other cotenant is established.

The conveyance by a tenant in common of a part of the estate by metes and bounds is not absolutely void, but is good by way of estoppel against the grantor and his heirs, and is valid against all persons unless avoided by the cotenants.

If the grantor of land is a disseisor at the time of the delivery of the deed, he is none the less such because in fact the title but for the disseisin is in him and another as tenants in common.

PETITION for partition of two parcels of real estate, one in Marblehead, and the other known as Baker's Island in Salem Harbor. After the former decision, reported 167 Mass. 251, the case was tried in the Superior Court, before *Hopkins, J.*

The jury returned a verdict for the respondents; and the petitioner alleged exceptions. The facts appear in the opinion.

S. H. Tyng, (*G. C. Abbott* with him,) for the petitioner.

H. P. Moulton, for the respondents.

HAMMOND, J. Francis Courtis, being seised of the two parcels of real estate named in the petition, namely, a house and land on Back Street in Marblehead, and Baker's Island in Salem Harbor, died testate, June 15, 1870, leaving a widow, Jane Courtis, the respondent, a son, Francis Mason Courtis, and two grandchildren, who were children of a deceased son, the petitioner Rebecca C. Frost being one of the grandchildren. When the case was originally tried in the Superior Court, the respondent claimed as a part of her defence that by the death of the testator's son, Robert Harris Courtis, who died before the testator, the interest devised to Robert did not lapse, but went to the survivors named in the second clause of the will, namely, to the respondent and her son, Francis Mason Courtis; and upon this issue a verdict in the Superior Court was directed for the respondent, and the case was reported to this court under the following terms, namely: "If the ruling was right, judgment is to be entered

on the verdict; if the ruling was wrong, the verdict is to be set aside, and by agreement of parties a new trial granted to try the issue of title by prescription of the respondent, Jane Courtis." This court decided that the devise to Robert Harris Courtis lapsed, (see *Frost v. Courtis*, 167 Mass. 251,) and by a rescript directed that, in accordance with the report, the verdict should be set aside and the case should stand for trial on the issue whether the respondent Jane Courtis has acquired title by prescription. The case came on again for trial in the Superior Court, and in the course thereof the court allowed the respondents to amend the answer, setting up as a defence that the petitioner was estopped from claiming any interest in Baker's Island adverse to the respondent Morse, or any person claiming under him. To this the petitioner excepted. Her contention is that, it having been agreed by the parties in open court, at the time when the case was reported to this court as aforesaid, that a new trial, if granted, should be merely to try the issue of title by prescription of the respondent, Jane Courtis, the court, as matter of law, had no right to allow the amendment. The court ruled that it had the right, and in the exercise of its discretion allowed the amendment.

On this part of the case the only question before us is whether the court had the power to allow the amendment. It is the policy of existing legislation and practice to allow amendments and pleadings to be made at any time before final judgment. Section 42 of the Pub. Sts. c. 167, allowing amendments, has always been liberally construed, and there can be no doubt that the Superior Court had the power to allow the amendment, notwithstanding the terms of the report of the first trial to this court and of the rescript thereon. *Hutchinson v. Tucker*, 124 Mass. 240. *Gray v. Everett*, 163 Mass. 77. *Terry v. Brightman*, 133 Mass. 536. *West v. Platt*, 124 Mass. 353, and cases therein cited. The amendment raised no defence inconsistent with the question of law decided by this court.

The trial of the case proceeded upon the defences set up by the respondents, namely, prescription and estoppel, the latter defence applying only to Baker's Island.

Of the thirteen requests for rulings, the court, while not adopting the precise language, gave in substance the first, and as to the second substantially ruled that mere continuous possession

by the respondent was not enough as against the petitioner, and refused the others; but as to the matter covered by the third and fourth ruled that, "If Jane Courtis and Francis Mason Courtis, the son, held adversely to those under whom the petitioners claim, and if, after the death of Francis Mason Courtis, Jane Courtis held adversely to them to April 21, 1887, which was the date of the deed to Morse, and if after the deed to Morse he held adversely to them to the date of filing this petition, and if that length of time added together amounts to more than twenty years, then the title became divested from the petitioner and vested in the respondents. That is to say, if mother and son occupied adversely during the lifetime of the son, and then the mother, who inherited from him, occupied adversely until she sold to Morse, which was in 1887, and if Morse after he purchased occupied adversely until the twenty years expired, then you can tack together those several periods of time, add them together, and if together they equal twenty years, then there had been twenty years adverse use by the respondents or those under whom they claim."

We think the law thus laid down was correct. *Sawyer v. Kendall*, 10 Cush. 241. The court defined in sufficiently accurate terms the elements necessary to constitute adverse possession as between cotenants, and also the elements of an *estoppel in pais*.

The petitioner also contends that the deed by the respondent to Dr. Morse, being a deed by a tenant in common of a part of the common estate by metes and bounds, was utterly void as against her. But such a deed is not absolutely void. The rule is stated in *De Witt v. Harvey*, 4 Gray, 486, 491, as follows: "Although a conveyance by a tenant in common of a portion of the estate in severalty is invalid as against his cotenants, and can be avoided by them, it is nevertheless good by way of estoppel against the grantor and his heirs, and is valid against all persons unless avoided by the cotenants." If the respondent Jane Courtis was a disseisor at the time of the delivery of the deed, (and that was the question on trial,) she was none the less such because in fact the title but for the disseisin was in her and the petitioner as tenants in common. If the deed took effect at all, it took effect as the deed of a disseisor, and that was the only claim made by the respondents as to its effect. Upon examining the evidence

as reported in the bill of exceptions, we are of the opinion that the case was rightly submitted to the jury, both on the question of disseisin and that of estoppel under instructions correct and sufficiently full. *Exceptions overruled.*

**WILLIARD C. HARDY, executor, & others, vs. ELIZABETH
B. SANBORN & others.**

Essex. November 1, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

*Will — Executor — Sale of Real Estate — Equity — Fraud — Debts and
Charges of Administration.*

Where, within a year after the proving of a will which gives the widow the "use, income, and improvement of all" the real property "with the right to sell any or all of the same during her natural life," and at her decease gives the same to certain devisees, a sale and conveyance of all the realty are made by her in good faith and for a valuable consideration, and by the terms of the deed the grantee claims thereunder subject to the rights of the executor as such, a bill in equity brought by the executor and devisees, the former contending that the sale is a cloud upon his title as executor, since he needs to make a sale of the land for the payment of debts and charges of administration, and the latter that it constitutes a fraud upon their rights, must be dismissed.

BILL IN EQUITY, by Williard C. Hardy, executor of the will of William N. Sanborn, and Addie M. Hardy and Susan A. Poore, two of the devisees thereunder, against the widow of the testator and others, praying that a deed given by the widow, within a year after the proving of the will, of all the testator's real estate, might be decreed to be a fraud on the rights of the plaintiffs, that the grantee reconvey the same to the executor, and that the grantee be enjoined from conveying the same to any one else.

To the widow the testator gave by his will the "use, income, and improvement of all my property, real, personal, and mixed, with the right to sell any or all of the same during her natural life," and at her decease he gave the same to certain devisees and legatees.

Trial in the Superior Court, before *Braley, J.*, who reported

the case for the determination of this court. The facts appear in the opinion.

H. J. Cole, for the plaintiffs.

H. P. Moulton, (*R. E. Burke* with him,) for the defendants.

HAMMOND, J. By the first item of the will, Elizabeth B. Sanborn, the widow, took a life estate in the real estate of the testator, coupled with the power to sell any or all of the same in fee. We assume, without deciding, that the power of sale does not give her an absolute right to all of the proceeds of such sale.

It is contended by the plaintiff Williard C. Hardy that the sale by Mrs. Sanborn is a cloud upon his title as executor of the will, since he needs to make a sale of the land for the payment of the debts and charges of administration of the estate of the testator; and by the plaintiffs Addie M. Hardy and Susan A. Poore that the sale constitutes a fraud upon their rights.

So far as the executor is concerned, any sale of the real estate by a devisee under the will is subject to his right to sell or mortgage under a license of the Probate Court for the payment of debts and charges of administration, and the deed to William N. Sanborn, Jr. shows upon its face that it is made subject to this right. The grantor states therein that her title "is derived by will of" her "deceased husband," and she covenants that the land is free from all encumbrances "except the lawful debts of my [her] deceased husband." It does not appear that the land is held adversely by the grantee, and he is therefore presumed to hold under the terms of his deed. So far, therefore, as the executor is concerned, there does not seem to be any need of this bill. The deed, under the circumstances, is no cloud upon the right of the executor to sell or mortgage by virtue of a license from the Probate Court.

While the answers to the bill affirm the right of the grantor to make the conveyance, they must be interpreted as meaning a conveyance such as this was, namely, subject to these rights of the executor. Whether the sale upon the assumption we have made is a fraud upon the rights of the other plaintiffs depends upon the character and circumstances of the transaction. The bill alleges that "the conveyance was made without any necessity therefor, and the sole motive therefor was to defraud the

plaintiffs Addie M. Hardy and Susan A. Poore of the real estate devised to them by the will."

But we do not think these allegations of the bill are sustained by the evidence. The evidence shows that the sale was made under the power in the will, and that Sanborn, the grantee, has made arrangements to pay the appraised value of the property, to wit, \$1,400, less the debts and charges of administration; and that he is ready and willing to pay that sum, and also the debts and charges of administration. The sale was made under the power given in the will, for a sufficient pecuniary consideration and in good faith. The bill therefore should be dismissed, with costs.

So ordered.

FLORENCE B. TILTON *vs.* INHABITANTS OF WENHAM.

MARION T. NORTH *vs.* SAME.

CHARLES H. TILTON *vs.* SAME.

Essex. November 2, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Personal Injuries — Way — Defect.

In an action against a town for personal injuries received while driving upon an ancient highway, it appeared that the way did not extend to the fences on the side, and in it was a muddy place with standing water, causing travel to turn to one side of the road over the grass to such an extent that a strip three or four feet wide was worn bare and looked like the rest of the road, and came up to within one inch of the stump of a pole about ten inches high and six inches in diameter, which was hidden by the grass that remained; and that the wheel of the plaintiff's vehicle struck against the stump, and he was thrown out. *Held*, that the jury would be warranted in finding that the stump was within the highway, and was a defect.

THREE ACTIONS OF TORT, the first two being for personal injuries occasioned to the plaintiffs respectively by an alleged defect in a highway in the defendant town; and the third being for injury to the plaintiff's property from the same cause. The cases were tried together in the Superior Court, before *Bishop*, J., who directed the jury to return a verdict for the defendant

in each case; and the plaintiffs alleged exceptions, which appear in the opinion.

F. Paul, for the plaintiffs.

H. P. Moulton, for the defendant.

HOLMES, J. These are actions to recover for injuries to person and property caused by an alleged defect in the highway. The way in question was Main Street in Wenham. There was evidence that it was a highway by prescription, but its width did not appear unless by presumption, and it was admitted by the plaintiffs that the road did not extend to the fences on the sides. Beside the point where the accident happened was a muddy place with standing water, and travel had turned to the easterly side of the road over the grass to such an extent that a strip three or four feet wide was worn bare, and looked like the rest of the road. At the time of the accident this strip came up to within an inch of the stump of a pole, about ten inches high and six and a quarter inches in diameter, which was hidden by the grass that remained. The plaintiffs Mrs. North and Mrs. Tilton were driving along the road in a southerly direction, and upon coming to the muddy place turned to the left over the above mentioned strip from which the grass had disappeared. In some way or other the left wheel of their vehicle struck the concealed stump, Mrs. North, who was driving, was thrown out, the horse ran away and brought the wagon against a trolley pole, and Mrs. Tilton was thrown out in her turn. We believe that this is a sufficient statement of the plaintiffs' case. The judge directed a verdict for the defendant, and the plaintiffs excepted.

The ruling is supported by an argument that it does not appear that the driver was using due care. But the evidence warranted a finding that Mrs. North was driving quietly along, and that the first trouble was caused by striking the concealed stump. We see no ground whatever for the suggestion that this is only conjecture, and that the horse may have been running away before the stump was reached.

The real question is whether there was evidence that the town was responsible for the defect. If the stump was outside the limits of the highway and of the way that was travelled, the case of *Marshall v. Ipswich*, 110 Mass. 522, points to the conclusion that the town was not bound to build a fence for the protection of

the public against it, any more than in the case of a stone of the same height. It is one of those usual things which travellers must look out for. The last part of the decision in this case suggests that the law is the same as to such small obstacles, even if within the limits of the highway, if they are not within the travelled part. But the language is ambiguous, and in other doubtful cases of a like character the question has been left to the jury. *Davis v. Charlton*, 140 Mass. 422. *Coggswell v. Lexington*, 4 Cush. 307. See *Warner v. Holyoke*, 112 Mass. 362, 367; *Harris v. Great Barrington*, 169 Mass. 271, 275. When we consider that the jury might have found that the responsibility of the town for the travelled part of the way extended over the strip from which the grass had been worn away, — *Moran v. Palmer*, 162 Mass. 196, *Aston v. Newton*, 134 Mass. 507, *Weare v. Fitchburg*, 110 Mass. 334, 337, (even according to *Coggswell v. Lexington*, 4 Cush. 307, if that strip was outside the limits of the highway,) — and that the stump was hidden and within an inch of the strip, we are of opinion that, under the decision last cited, if the stump was within the highway, the jury would have been warranted in finding it a defect. If it was a defect, they could have inferred from its position and the time during which it seemed from its appearance, condition, and surroundings to have stood where it was, that the defendant had notice of it. *Noyes v. Gardner*, 147 Mass. 505. *Bourget v. Cambridge*, 159 Mass. 388. *Welsh v. Amesbury*, 170 Mass. 437. It is not argued that any part of the damage is too remote. *Marble v. Worcester*, 4 Gray, 395, 403.

If, then, the jury might have found that the stump was within the limits of the highway, the case should not have been taken from them. The only evidence was that the highway was ancient, and it was admitted, as we have said, that it did not extend to the fences. But the case of an ancient highway is somewhat different from that of a private way or other private easement by prescription, where the suggestion of a lost grant is a pure fiction having a well known historical explanation. In the case of an important public way there is a real working probability that it has been sanctioned by some public action, even though no record of such action is produced. The offer of evidence of which we shall have to speak indicates that there was

a location in this case. If there was any such, it is very improbable that the width was not greater than that of the travelled part of an ordinary country road. And even if there never has been any laying out of the road or taking of land, where no fence fixes the limits, it fairly may be inferred that the assertion of right by public user is not confined to the space between the wheel ruts. We are of opinion that the jury would have been warranted in finding that the stump was within the highway. See *Hannum v. Belchertown*, 19 Pick. 311, 312; *State v. Morse*, 50 N. H. 9, 20; *Bumpus v. Miller*, 4 Mich. 159, 164; *Bartlett v. Beardmore*, 77 Wis. 356, 363; *Davis v. Clinton*, 58 Iowa, 389, 392.

In view of our decision upon the main question the two exceptions to the exclusion of evidence become unimportant. The plaintiffs offered to prove that the stump was cut off after the accident, by order of the board of selectmen. The offer now is justified as evidence that the town exercised authority over the place as part of the highway; but when the evidence was offered and rejected, it probably was understood by everybody, unless the plaintiffs' counsel is to be excepted, to be offered as evidence of an admission by subsequent conduct. The plaintiffs also offered to prove that the highway did not run where the actual legal location would take it, by an engineer who had tried to fix the east line of Main Street from what was said to be a copy of the location. But the copy was not proved to be a correct copy. We hardly should have sustained these exceptions;—but at another trial the questions raised are not likely to be important.

Exceptions sustained.

FRANK P. HARDIMAN vs. JOHN H. WHOLLEY.

Essex. November 7, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Injuries caused by Kick of a Horse.

At the trial of an action for personal injuries caused by the kick of a horse, it appeared that the wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that the horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk at right angles to it; and, as the plaintiff approached, he suddenly whirled round and kicked him. *Held*, that it was unnecessary to prove that the horse was vicious, and that the refusal to direct a verdict for the defendant was correct.

TORT, for personal injuries occasioned to the plaintiff by the kick of a horse. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

F. J. Keleher, for the defendant.

H. S. Stearns, for the plaintiff.

HOLMES, J. This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that this horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached, suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser and kicks another, the kick will enhance the damages without proof that the animal was vicious and that the owner knew it. *Lee v.*

Riley, 18 C. B. (N. S.) 722. See *Lyons v. Merrick*, 105 Mass. 71, 76. So, in this Commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious. *Barnes v. Chapin*, 4 Allen, 444. *Marsland v. Murray*, 148 Mass. 91. *Dickson v. McCoy*, 39 N. Y. 400, 401. See *Cox v. Burbidge*, 18 C. B. (N. S.) 430. The same law naturally would be applied to a horse upon a sidewalk where it ought not to be, (see *Mercer v. Corbin*, 117 Ind. 450, 454,) and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment.

Exceptions overruled.

JOHN H. HINCKLEY vs. MARTHA A. GUYON.

Suffolk. November 7, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Tenancy at Will — Notice to Quit — Summary Process for Recovery of Land — Agreement for a Lease.

If A. is a tenant not of B. but of C., or if having been a tenant of B. he has been ousted by C., having a paramount title, and then has remained in possession as C.'s tenant, B. cannot maintain an action on Pub. Sts. c. 175, to recover possession of the premises; but if A. remained the tenant of B. and there is evidence of this, then B. can maintain the action.

Where, in an action for the recovery of land under Pub. Sts. c. 175, § 2, the plaintiff contended that the defendant was his tenant and not the tenant of the owner, but there was evidence for the jury that the defendant was and remained the tenant of the plaintiff, the court said that it might be assumed that a certain written agreement between the owner and the plaintiff did not constitute a lease, but only an agreement for a lease for one or five years, at the option of the plaintiff.

ACTION on Pub. Sts. c. 175, to recover possession of certain premises in Boston. Writ dated December 12, 1896. Trial in the Superior Court, before *Maynard*, J., who directed the jury to return a verdict for the defendant, and the plaintiff alleged exceptions, in substance as follows.

The defendant claimed to be a tenant at will of one Edwin

Dunlap, the owner of the premises. The plaintiff claimed to be a tenant of the same owner and of the same premises by a title anterior and superior to the title of the defendant, and that the defendant was the plaintiff's tenant, and not the tenant of the owner, and introduced in evidence the following:

" Boston, September 24, 1896.

" An Agreement entered into between Mr. Edwin Dunlap of Bedford, N. H., and Mr. John H. Hinckley of Boston, Mass.

" I herein agree to give Mr. Hinckley full charge of my house, No. 11 Union Park, Boston, to sell or to rent same and to collect all rents and to make all necessary repairs as he may deem fit from time to time. Also to sell the furniture now in house, as best he can, not, however, for less than (\$600) six hundred dollars, without first obtaining my consent; neither is he to sell the house for less than (\$12,000) twelve thousand dollars, without my written agreement. This agreement to hold good for one or five years from date, or I agree to let the said house to Mr. Hinckley at his option for one or five years with *permission* to let. He is to agree to pay me five per cent (5%) on my equity of (\$8,000) eight thousand dollars, and (4%) on the mortgage of four thousand dollars (\$4,000). Mr. Hinckley is to do all painting inside that he thinks necessary, and also to do the painting outside; provided, however, he should sell the furniture for more than six hundred dollars I will pay for the painting the outside of house, or as far as the money over and above (\$600) six hundred will go, and if any money is left after painting outside it is to go to me.

Edwin Dunlap."

There was evidence for the jury that the plaintiff on his own account let the premises to the defendant at ninety dollars a month in advance, and put her in possession as his tenant; that the defendant paid one month's rent, and no more; that after another month's rent became due the plaintiff gave the defendant fourteen days' notice to quit, in writing, in accordance with Pub. Sta. c. 121, § 12; that the defendant remained in possession, and that after the expiration of the fourteen days the plaintiff brought the present action to recover possession under Pub. Sta. c. 175.

W. W. Carruth, (J. S. Richardson with him,) for the plaintiff.

H. N. Allin, for the defendant.

FIELD, C. J. There was evidence for the jury that the plaintiff on his own account let the premises to the defendant at \$90 a month in advance, and put her in possession as his tenant; that the defendant paid one month's rent, and no more; that after another month's rent became due the plaintiff gave the defendant fourteen days' notice to quit, in writing, in accordance with Pub. Sts. c. 121, § 12; that the defendant remained in possession, and that after the expiration of said fourteen days the plaintiff brought this action to recover possession under Pub. Sts. c. 175.

If the defendant was a tenant not of the plaintiff but of Dunlap, or if having been a tenant of the plaintiff she had been ousted by Dunlap, having a paramount title, and then had remained in possession as Dunlap's tenant, the plaintiff could not maintain the action. But if she remained the tenant of the plaintiff and there was evidence of this, then the plaintiff could maintain the action. *Coburn v. Palmer*, 8 Cush. 124. *Cobb v. Arnold*, 8 Met. 398. *Morse v. Goddard*, 13 Met. 177. *Towne v. Butterfield*, 97 Mass. 105. *Hilbourn v. Fogg*, 99 Mass. 11. *Hawes v. Shaw*, 100 Mass. 187. *Holbrook v. Young*, 108 Mass. 83. *Eddy v. Coffin*, 149 Mass. 463.

It may be assumed that the written agreement between Dunlap and the plaintiff did not constitute a lease, but only an agreement for a lease for one or five years, at the option of the plaintiff. *Kabley v. Worcester Gas Light Co.* 102 Mass. 392. *McGrath v. Boston*, 103 Mass. 369. *Shaw v. Farnsworth*, 108 Mass. 357. *Eastman v. Perkins*, 111 Mass. 30.

Exceptions sustained.

**CHARLES M. HARDING vs. LYNN AND BOSTON RAILROAD
COMPANY.**

Suffolk. November 10, 1898. — January 6, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Defective Notice to Corporation.

In an action for personal injuries under the employers' liability act, St. 1887, c. 270, the notice was directed to the "E. M. Street Railway Co.," and stated that the plaintiff was injured by being thrown from the top of one of the cars of that company. It was served upon that company by delivering a copy to its president, who was also president of the defendant company. The first named company had recently been leased to the defendant company. *Held*, that the notice was rightly excluded, and that St. 1894, c. 389, relative to notices in cases of injuries to persons or property, did not apply.

TORT, for personal injuries occasioned to the plaintiff, an employee of the defendant, by the alleged negligence of the defendant's superintendent. The declaration was under the employers' liability act, St. 1887, c. 270.

At the trial in the Superior Court, before *Hardy, J.*, there was no evidence tending to show that the plaintiff was injured by being thrown from the roof of a car belonging to or operated by the East Middlesex Street Railway Company, or that the car from which he fell was standing at the time of the accident upon any track belonging to or operated by the East Middlesex Street Railway Company, or that the superintendent was employed by the East Middlesex Street Railway Company. A notice, a copy of which is given below, was served upon the East Middlesex Street Railway Company, by being delivered to A. F. Breed, its president, on August 4, 1894, the day of its date. Breed was at that time also president of the defendant company, and the East Middlesex Street Railway Company had recently been leased to the defendant company. The notice was as follows: "To the East Middlesex Street Railway Company: You are hereby notified that on the twenty-ninth day of July, 1894, between the hours ten and eleven in the afternoon, at or near the junction of Everett Avenue and Broadway, in the city of Chelsea, Massachusetts, I was severely injured by being thrown

from the top of one of the cars of your company. I was upon the top of said car, and in the act of holding and pressing the trolley pole, which reaches from the top of the car to the trolley wire overhead, on to the trolley wire, when I was suddenly thrown to the ground. I was acting under orders of my superior at the time I fell, and was using due care."

The judge excluded the notice, on the ground that it was not a notice to the defendant, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

E. S. Page, for the plaintiff.

W. I. Badger, for the defendant.

MORTON, J. The notice was directed to "the East Middlesex Street Railway Company," and states that the plaintiff was injured by being thrown from the top of one of the cars of that company. The sheriff's return of service of the notice is that he served it upon the East Middlesex Street Railway Company by delivering a copy to A. F. Breed, its president. It appears that Breed was also president of the defendant corporation, and that the East Middlesex Street Railway Company had recently been leased to the Lynn and Boston Railroad Company. The court excluded the notice, on the ground that it was not a notice to the defendant. This was correct. The case is not one in which there was an omission to state the time, place, and cause of the injury correctly, but in which there was no notice whatever to the defendant. St. 1894, c. 389, relative to notices in cases of injuries to persons or property, therefore does not apply.

Exceptions overruled.

ATTORNEY GENERAL vs. ARTHUR McCABE.

Suffolk. November 8, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

City Physician — Board of Health — Statute — Ordinance — Alien.

The St. 1878, c. 21, (Pub. Sts. c. 80, § 15,) relating to the office of city physician, is confined to cities which have accepted St. 1877, c. 133, or the corresponding provisions of the Public Statutes, relating to the board of health in cities.

In the absence of statutory authority, the city council of a city cannot delegate to the mayor its power to appoint a board of health.

Judicial notice cannot be taken of the ordinances of a city, unless they are put in evidence.

A person elected, under St. 1873, c. 246, § 13, city physician of Gloucester, which city is not shown to have accepted St. 1877, c. 133, relating to the board of health in cities, appears to have been duly elected, but he is not *ex officio* a member of the board of health under the provisions of an ordinance which purports to delegate to the mayor the power of the city council to appoint a board of health.

An alien is eligible to the office of city physician of a city, if he is not *ex officio* a member of the board of health.

INFORMATION, in the nature of a *quo warranto*, filed February 4, 1898, alleging that the respondent was usurping the office of city physician of the city of Gloucester. Hearing before Holmes, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

H. J. Edwards & *R. E. Harding*, for the respondent.

E. S. Taft, for the relator.

FIELD, C. J. Section 13 of St. 1873, c. 246, being the charter of the city of Gloucester, is as follows: "The city council shall annually, as soon after their organization as may be convenient, elect by joint ballot in convention, a treasurer, collector of taxes, city clerk, one or more superintendents of highways, and a city physician, and by concurrent vote a city solicitor and city auditor, who shall hold their offices respectively for the term of one year, and until their successors are chosen and qualified; provided, however, that either of the officers named in this section may be removed at any time by the city council for sufficient cause." Section 29 of said chapter is as follows: "All power and authority now vested by law in the board of health of

the town of Gloucester, or in the selectmen thereof, shall be transferred to and vested in the city council, to be by them exercised in such manner as they may deem expedient."

The report of this case by the single justice is as follows:

"It was admitted that the respondent was elected city physician on January 3, 1898, by the city council of Gloucester, by joint ballot in convention, and was sworn in as member of the body acting as board of health on January 4, 1898, subject to the question whether such an election was valid, and whether said board of health was lawfully appointed, as will be stated. He was elected chairman of said board, and has continued to act as such. At the foregoing dates, the respondent was an alien, although he was naturalized on January 15, 1898. By chapter 12, section 1, of the ordinances of Gloucester, printed in 1886, which may be referred to, 'In the month of January the mayor shall appoint, subject to the approval of the city council, two persons, not members of the city council, who, together with the city physician, shall constitute the board of health of the city of Gloucester. The persons so appointed shall enter upon the duties of their office forthwith.' . . .

"The board of health above referred to was appointed under this ordinance. The respondent denied the validity of the ordinance, on the ground that by the charter, St. 1873, c. 246, § 29, 'All power and authority now vested by law in the board of health of the town of Gloucester, or in the selectmen thereof, shall be transferred to and vested in the city council, to be by them exercised in such manner as they may deem expedient.' The respondent also contended that this was a 'different provision made by law,' which excluded the operation of Pub. Sts. c. 80, § 4, or St. 1895, c. 332. The relator contended that, either by the charter or by the last cited statutes, the appointment of the board of health was valid, and, if so, it was not denied that the respondent, if duly elected, would be a member of it *ex officio* under the ordinance.

"The respondent further contended that, if the above proposition should be ruled against him, still his office was open to be held by an alien. The relator maintained the contrary, and also that the election of the respondent was void by St. 1878, c. 21, now embodied in Pub. Sts. c. 80, § 15, which, he contended,

repealed § 13 of the charter, in pursuance of which the respondent was elected, so far as that section referred to the city physician, the city having continued to elect in the old way since the passage of the act of 1878. The city has appointed a board of health in the mode above stated since 1881, inclusive, and in other ways from an earlier date. The respondent is not entitled to hold his office unless this report discloses a right on his part to do so. Whether such a right is disclosed I report for the consideration of the full court."

Gen. Sts. c. 26, §§ 1, 2, in force when the charter was passed, are as follows: "Section 1. A town respecting which no provision is made by special law for choosing a board of health may, at its annual meeting or at a meeting legally warned for the purpose, choose a board of health, to consist of not less than three nor more than nine persons; or may choose a health officer. If no board or officer is chosen, the selectmen shall be the board of health. Section 2. Except where different provision is made by law, the city council of a city may appoint a board of health; may constitute either branch of such council, or a joint or separate committee of their body, a board of health, either for general or special purposes, and may prescribe the manner in which the powers and duties of the board shall be exercised and carried into effect. In default of the appointment of a board with full powers, the city council shall have the powers and perform the duties prescribed to boards of health in towns." See Pub. Sts. c. 80, §§ 3, 4.

The ordinance referred to in the report as c. 12, § 1, of the ordinances of Gloucester, printed in 1886, was plainly not passed in pursuance of any of the statutes we have cited, and we know of no statute in force in the city of Gloucester which authorizes the mayor to appoint the members of the board of health, either with or without the approval of the city council.

It does not appear that St. 1877, c. 133, was ever accepted by the legal voters of the city of Gloucester, and therefore it does not appear that Pub. Sts. c. 80, § 15, is in force in that city.

St. 1878, c. 21, now Pub. Sts. c. 80, § 15, is confined to cities which have accepted St. 1877, c. 133, or the corresponding provisions of the Public Statutes. See Pub. Sts. c. 80, §§ 7-12; *Commonwealth v. Swasey*, 133 Mass. 538. It therefore does not

appear that the city council was authorized to pass the ordinance recited in the report. In the absence of statutory authority, the city council could not delegate to the mayor its power to appoint a board of health.

We take judicial notice of the acts incorporating the city of Gloucester, as well as of the general statutes, (Pub. Sts. c. 169, § 68,) but we cannot take notice of the ordinances of the city unless they were put in evidence. We are therefore confined to the ordinances referred to in the report. The respondent appears to have been duly elected city physician by the city council, but he is not *ex officio* a member of the board of health, as the ordinance making him so does not appear to be valid. It is not contended that an alien is not eligible to the office of city physician when the city physician is not a member of the board of health.

As the respondent appears to have been duly elected city physician by the city council, the information must be dismissed.

So ordered.

WILLIAM R. HONSUCLE vs. STANLEY RUFFIN & another.

Suffolk. November 9, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

False Representations — Evidence — Damages — Instructions.

In an action for false representations, by which the plaintiff was induced to buy stock of a corporation, to the effect that a certain amount of the capital had been paid in, the plaintiff testified to the representations, and also put in a letter of the defendant written to a third person soon after the conversation, stating that the corporation had no stockholders. The defendant was then asked by his counsel to explain what he meant by the expression; but any explanation was excluded. *Held*, that the rule requiring the excepting party to show what the testimony was expected to be must be applied.

It seems that, if a writing is put in merely as an admission, it may be explained by the writer, even though the explanation contradict the proper construction of the written words.

An instruction to the jury, in an action for false representations in the sale of stock, that if the plaintiff ought to have discovered the truth before he put in the money, they should find for the defendant, is sufficiently favorable to the latter. In an action for false representations, by which the plaintiff was induced to buy

stock of a corporation, to the effect that a certain amount of the capital had been paid in, the defendants testified that they had put in the safe connected with the corporation's office several hundred dollars of their own money which had been spent for rent, tools, and trips to another State in behalf of the corporation. An instruction to the jury was asked, that if the money "was used by the defendants in the furtherance of the business of the corporation with the intention that it should be applied to the payment of stock as cash, the certificate of stock to be issued later, then they would not be justified in finding that it was a liability of the company." *Held*, that the refusal of this instruction afforded no ground of exception.

TORT, for false representations in the sale of stock of the Eastern Construction Company. At the trial in the Superior Court, before *Hardy, J.*, the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

F. K. Linscott, for the defendants.

S. R. Jones, for the plaintiff.

HOLMES, J. This is an action for false representations by which the plaintiff was induced to buy stock of a corporation. The representations relied on were to the effect that a certain amount of the capital had been paid in. At the trial the plaintiff testified to the representations, and also put in a letter of the defendant Ruffin, written to a third person soon after the conversation, stating that the corporation had no stockholders. Ruffin was asked by his counsel to explain what he meant by the expression, but the court excluded any explanation, on the ground that the meaning was plain and the letter must speak for itself. The defendants excepted.

We should be of opinion that this evidence ought to have been admitted, if that were the only question before us. An entirely different principle applies from that which would govern the interpretation of a contract, will, or other instrument, prepared with a view to legal effect, or relied on as founding an estoppel. The letter was important merely as showing knowledge, or a certain state of mind with regard to the condition of the company, for the purpose of establishing one element of the alleged fraud. Hence, whereas in the case of wills, contracts, etc., we ask what the words used would mean in the mouth of one writing the language in a normal way under the circumstances, here the meaning of the individual, however inconsistent with the words, his actual state of mind, is the thing to be found, and there is

no ground of statute, consideration of the rights of others, or policy, to limit our mode of inquiring into it. In *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, the majority of the court went much further than this. But the exceptions do not show what explanation was expected. It is difficult to imagine the possibility of any explanation as distinguished from a statement that the words were intended to deceive the Attorney General's office, to which the letter was addressed. An explanation of the latter sort requires no particular favor, and short of that it is hard to see how the defendants have been harmed by the exclusion. Although always reluctant to do so, we feel bound to apply the rule requiring the excepting party to show what the testimony was expected to be. *Commonwealth v. Smith*, 163 Mass. 411, 429, and cases cited.

An instruction was asked that the rule of damages was the difference between the actual value of the property at the time of the purchase and its value if it had been what it was represented to be. *Whiting v. Price*, ante, 240. The jury were instructed that it was the difference between the par value of the stock which the plaintiff paid and its value when he discovered the fraud. But the jury made the time selected immaterial by finding, in answer to questions, that the stock was of no value either at the time of the purchase or at the date of the writ, as these findings meant that the stock was of no value at any time after the purchase.

Another instruction asked was, that if the plaintiff by the use of reasonable diligence could have ascertained the truth or falsity of the alleged declarations and did not do so, he could not recover. The judge told the jury that, if the plaintiff ought to have discovered the truth before he put in the money, they should find for the defendants. This instruction sufficiently saved the defendants' rights. *Whiting v. Price*, ante, 240.

The defendants testified that they had put in the safe connected with the company's office some thirteen or fourteen hundred dollars of their own money, which, except one hundred dollars, had been spent for rent, tools, and trips to New York in behalf of the company. An instruction was asked, that if the money "was used by the defendants in the furtherance of the business of the corporation with the intention that it should be applied to

the payment of stock as cash, the certificate of stock to be issued later, then they would not be justified in finding that it was a liability of the company." We should be unwilling to grant a new trial for the refusal of this ruling. For, without considering nicely what would amount to paying the money in to the corporation, it is enough to notice that the question whether anything was done which was intended as a payment, or which amounted to putting the money into an enclosure of the company with a *bona fide* renunciation of control over it except through the corporation, was omitted from the request. It was quite possible that the acts testified to, if done, did not import and were not accompanied by a renunciation of control. *Commonwealth v. Ryan*, 155 Mass. 523, 529, 530. If the defendants simply spent their money on travelling expenses, etc., with the intent that their expenditures should work as payments on account of stock, while it might be that they would have a claim against the corporation for reimbursement, their intent was ineffectual under the law. It did not bind the corporation, or amount to paying in in cash. See Pub. Sts. c. 106, §§ 47, 49. *Exceptions overruled.*

JAMES D. THOMSON vs. WILLIAM T. WAY.

Suffolk. November 10, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

*Poor Debtor's Recognizance — Agreement by Creditor for Continuance —
Default of Principal — Defence to Action.*

Either the refraining from surrendering the principal in a poor debtor's recognizance, or the surety's promise to pay the execution on which the principal was arrested, is a consideration for an agreement by the creditor to continue the matter from week to week.

Where the creditor in a poor debtor's recognizance has agreed to continue the matter from week to week, provided the surety will pay by specified instalments the execution on which the principal was arrested, if at the time when the creditor has the principal defaulted the surety has done all that he was bound to do, it is immaterial that he has not kept his tender good.

CONTRACT, against the surety on a poor debtor's recognizance.
Trial in the Superior Court, without a jury, before *Gaskill, J.*,

who found for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. D. Thomson, pro se.

C. F. Eldredge, for the defendant, submitted the case on a brief.

HOLMES, J. This is an action upon a recognizance, given, we infer, under Pub. Sts. c. 162, § 28, upon the arrest of the principal on execution. The defence relied on at the trial was an agreement by the plaintiff to continue the matter from Saturday to Saturday, if the defendant would pay the execution by specified instalments. The judge found for the defendant, and found as facts that the agreement was made and kept by the defendant, and that the defendant offered the plaintiff the instalment which was due before the plaintiff had the principal in the recognizance defaulted, but that the plaintiff without cause refused to receive it. It is stated that the plaintiff excepted to the findings of fact. We assume that this means that the plaintiff excepted on the ground that the findings were not warranted by the evidence.

It is argued that there was no consideration for the agreement. But the defendant testified that he notified the plaintiff that on the return day of the notice to take the oath he should "surrender the principal unless some agreement was made, and thereupon he and the plaintiff agreed that if he would pay the execution" as just stated, the plaintiff would continue the case as just stated. The defendant further implied by his testimony that he did not surrender the principal, and testified to payments and offers to pay. The testimony warranted a finding of consideration, either in the defendant's refraining from surrendering the principal or in his promise to pay the execution. The latter promise was not like a promise to the same effect by the principal, — a mere promise to do what he already was bound to do, — such as was before the court in *Abbott v. Tucker*, 4 Allen, 72. See *Doane v. Bartlett*, 4 Allen, 74. The question of consideration even in the latter case seems to have been regarded as not free from doubt in *Merrill v. Roulstone*, 14 Allen, 511, 514.

It is urged also that the offer refused by the plaintiff was not on Friday, as agreed, but on the morning of the next day. It does not appear that we have all the evidence before us. But

it does appear that the defendant went to the plaintiff's office and could not find him. Finally, it is pressed that the defendant had not kept his tender good. But this suggestion has no bearing on the case. The only question is whether the plaintiff was warranted under his agreement in defaulting the principal on the recognizance when he did. If at that time the defendant had done all that he was bound to do, it does not matter what he has omitted since.

It hardly is denied that the agreement, if upon sufficient consideration and kept by the defendant, is an answer to this suit. The question is not open on the exceptions. If it were, it would not be necessary to go further than to say that, so far as the breach relied on is concerned, the judge was warranted in finding that the plaintiff had waived an appearance by the principal upon that day. *Mount Washington Glass Works v. Allen*, 121 Mass. 283. *Exceptions overruled.*

CASSIUS C. POWERS vs. GEORGE A. P. CODWISE, executor.

Suffolk. November 14, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Scire Facias — Trustee Process — Will — Void Legacy — One Half of Residue to be administered as Intestate Estate.

A testator gave by will the residue of his estate "unto my two nieces now living, G. and F., . . . to be equally divided between them, share and share alike." The legacy to G. was void under Pub. Sts. c. 127, § 3. *Held*, that that legacy must be administered as intestate property.

SCIRE FACIAS. Trial in the Superior Court, without a jury, before *Richardson, J.*, who ruled that the legacies to *Georgie S. Livermore* were void, and went to the heirs at law of the testator as undevised estate, and that as the share of the original debtor, *Elisha W. Shaw*, in this personal property was \$22.50, the plaintiff was entitled to judgment for that amount and costs; and the defendant alleged exceptions. The facts appear in the opinion.

G. A. P. Codwise, pro se.

C. C. Powers, pro se.

FIELD, C. J. This is a writ of scire facias to recover a certain amount of money from the defendant, who, as executor of the will of James M. Shaw, was charged as trustee in an action by the plaintiff against Elisha W. Shaw. Isaac H. Hazelton, Oliver C. Livermore, and Arnold Livermore were the witnesses, and the only witnesses, to the will. Oliver C. Livermore when the will was executed was, and ever since has been, the husband of Georgie S. Livermore, who was one of the nieces of James M. Shaw living at the time of his decease. The three articles of the will material to the present case are as follows :

"Fourth. I give and bequeath to each of my nieces living at my decease \$100. . . .

"Seventh. I give and bequeath, as a token of remembrance to each, Elisha W. Shaw, Daniel C. Shaw, Frank M. Shaw, and Sanford P. Judkins, \$50.

"Eighth. All the rest, residue, and remainder of my estate, whether real, personal, or mixed, I give, devise, and bequeath unto my two nieces now living, Georgie S. Livermore and Fanny M. Hildreth, daughters of my late brother, George W. Shaw, deceased, to be equally divided between them, share and share alike, to hold by them and their heirs and assigns forever."

The present defendant has paid to the plaintiff \$50, with interest, being the amount of the legacy given to Elisha W. Shaw by the seventh article of the will. The Superior Court ruled that all legacies given by the will to Georgie S. Livermore are void, because she was and is the wife of one of the three witnesses of the will. Pub. Sts. c. 127, § 3. The gift of \$100 to Georgie S. Livermore by the fourth article of the will being void, this would go into the residue of the estate given and devised by the eighth article. By the eighth article the residue is given and devised unto two nieces, Georgie S. Livermore and Fanny M. Hildreth, "to be equally divided between them, share and share alike."

The only question of law raised by the exceptions is whether, that part of the residue of personal property given to Georgie S. Livermore being void, the whole goes to Fanny M. Hildreth, or whether the part given to Georgie S. Livermore must be admin-

istered as intestate estate. We think that the Superior Court rightly ruled that, under the residuary clause, one half of the residue was given to Georgie S. Livermore, and, being void, this one half must be administered as intestate property. *Lombard v. Boyden*, 5 Allen, 249. *Sohier v. Inches*, 12 Gray, 385. *Swallow v. Swallow*, 166 Mass. 241. *Frost v. Courtis*, 167 Mass. 251. *Burnet v. Burnet*, 3 Stew. (N. J.) 595.

Exceptions overruled.

JOHN REED vs. POLICE COURT OF LOWELL & another.

Middlesex. November 15, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Certiorari — Police Court — Recognizance — Judgment — Forfeiture.

The facts that after default on a recognizance, which was entered into by a person arrested and brought before a police court upon a criminal complaint, and after the money deposited by him instead of giving a surety had been adjudged forfeited and had been paid to the treasurer of the county, the prisoner was recaptured on a *capias* issued by the police court, and was brought before that court, where he pleaded not guilty, waived an examination, and was ordered by the police court to be committed for trial before the Superior Court, where, upon indictment found, he was afterwards tried, convicted, and sentenced, do not make void the judgment of the police court declaring the money forfeited.

That a police court did not have jurisdiction to impose sentence upon a person arrested and brought before it upon a criminal complaint, and that a recognizance which he entered into for his future appearance at that court contained the words "sentence," "final sentence," and "term," do not render the recognizance void, but those words may be rejected as surplusage, or "term" may be construed to mean time, and "sentence" to mean order; and the recognizance cannot be construed so as to require his appearance before the Superior Court.

Upon default of a person who has been arrested on a complaint for the larceny of thirty-five hundred dollars, and entered into a recognizance for his future appearance at a police court, and deposited the sum of seven thousand dollars instead of giving a surety, that court has authority to adjudge the money forfeited, and to order it to be paid to the treasurer of the county.

PETITION for a writ of certiorari, to quash an order or judgment of the Police Court of Lowell.

The petition alleged that the petitioner, who was serving at the state prison a sentence of the Superior Court, was arrested

on December 24, 1897, upon a complaint for the larceny of \$3,500 upon a warrant issued from the Police Court of Lowell, and entered into a recognizance before a master in chancery, the material parts of which are as follows:

"The condition of this recognizance is such, that whereas, at a Police Court holden at Lowell, on the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and ninety-seven, the said John Greenhalge alias John Reed was brought before said court by virtue of a warrant, issued in due form of law, to answer to the Commonwealth of Massachusetts on the complaint under oath of Charles Sweetser of Chelmsford charging him with the crime of larceny from said Charles Sweetser, and said court having ordered said Greenhalge, otherwise Reed, to recognize with sureties in the sum of seven thousand dollars for his personal appearance at the said Police Court, next to be holden at Lowell, within the county of Middlesex, on the thirty-first day of December current at ten o'clock in the forenoon, to answer to said complaint, and to whatever else shall then and there be objected against him in behalf of said Commonwealth, and abide the order and the sentence of the court thereon, and also in like manner personally appear at any subsequent term of said Police Court to which the proceedings in the premises may be continued, if not previously surrendered and discharged, and so from term to term until the final decree, sentence, or order of the court thereon, and to abide such final sentence, order, or decree of the court, and not depart without leave. And whereas, for non-compliance with said order, the said Greenhalge, otherwise Reed, now stands committed to the jail in Cambridge, and whereas said Greenhalge, otherwise called Reed, has deposited with me the sum of seven thousand dollars in lieu of giving sureties, —

"Now, if the said Greenhalge alias Reed, according to the above mentioned order of said court, shall personally appear before the said Police Court, next to be holden at said Lowell, within and for the county of Middlesex, on the thirty-first day of December current, and then and there answer to said complaint, and to whatever else shall then and there be objected against him in behalf of said Commonwealth, and abide the order and sentence of the court thereon, and also in like manner per-

sonally appear at any subsequent term of said court to which the proceedings in the premises may be continued, if not previously surrendered or discharged, and so from term to term until the final decree, sentence, or order of the court thereon, and abide such final sentence, order, or decree of the court thereon, and not depart without leave, then this recognizance to be void, otherwise to be and abide in full force, power, and virtue."

The petition further alleged that the Police Court had no jurisdiction to try or sentence the petitioner for said offence, and could only require him to appear at the next term of the Superior Court for the county, at the February sitting thereof, in accordance with the usual recognizance to the Superior Court, in which court the petitioner was present and was sentenced upon an indictment founded upon the offence charged and the same complaint instituted in the Police Court; that the Police Court had no authority to compel the petitioner to answer as required in the recognizance in that court; that the Police Court on December 31, 1897, the date on which the petitioner was required to appear therein for examination, entered a default upon his non-appearance, and unlawfully declared said sum of \$7,000 forfeited, and on January 1, 1898, paid over such sum to the county treasury for the county of Middlesex, without authority except such default; that the object of the proceedings was to secure the attendance of the petitioner at the Superior Court; that the petitioner was recaptured on January 14, 1898, and held for trial in the Superior Court at the same term or sitting when proceedings were first instituted to compel his attendance, when and where he would have been tried as required by the recognizance; that by the terms of the recognizance, the petitioner was bound to appear at the court in which he was sentenced, and his recapture could not be pleaded in the Police Court of Lowell, the proceedings therein being terminated upon the default; that the Police Court had no right to forfeit his bail until after the term of the Superior Court to which the proceedings were instituted to enforce his appearance; that the proceedings by which the bail was forfeited were beyond the jurisdiction of the Police Court of Lowell; that the adjudication of forfeiture deprived the petitioner of his property without an opportunity to appeal or have the matter determined by a jury, and was in violation of

the provisions of the Constitution of the United States, and void; and that the proceedings were also in violation of the provisions of the Constitution of the Commonwealth, and void.

The prayer of the petition was that the judgment or order of forfeiture be annulled and quashed; and that the treasurer of the county of Middlesex be directed to repay the sum so deposited to the petitioner, as provided in Pub. Sts. c. 212, § 66.

An abstract of the record of the Police Court showed that, upon a *capias* issued by that court, the petitioner was brought before it, pleaded not guilty, waived an examination, and was ordered to be committed for trial before the Superior Court.

The Police Court of Lowell demurred to the petition. Hearing before *Barker, J.*, who, at the request of the parties, reserved the case upon the petition and demurrer for the consideration of the full court.

W. A. Gile, for the petitioner.

F. N. Wier, for the Police Court of Lowell.

FIELD, C. J. This is a petition for a writ of certiorari to be addressed to the Police Court of Lowell for the purpose of quashing or annulling an order or judgment of that court whereby the sum of \$7,000, which the petitioner had deposited on giving his personal recognizance in a criminal complaint against him before that court, was adjudged to be forfeited, and was ordered to be paid to the treasurer of the county of Middlesex, and was so paid. Pub. Sts. c. 212, § 68.

The point has not been taken that certiorari is not the proper remedy. See *Lynch v. Crosby*, 134 Mass. 313. The proceedings on the criminal complaint appear to have been in accordance with the statutes. Pub. Sts. c. 212, §§ 26, 46, 53, 68-71. St. 1882, c. 134.

The facts that after default on his recognizance, and after the money had been adjudged forfeited and had been paid to the treasurer of the county of Middlesex, the prisoner was recaptured on a *capias* issued by the Police Court, and was brought before that court, where he pleaded not guilty and waived an examination, and was ordered by the Police Court to be committed for trial before the Superior Court, where upon indictment found he was afterwards tried, convicted, and sentenced,

do not make void the judgment of the Police Court declaring the \$7,000 forfeited.

That the Police Court did not have jurisdiction to impose sentence upon the petitioner, and that the recognizance contains the words "sentence," "final sentence," and "term" do not render the recognizance void. The recognizance substantially follows the provisions of Pub. Sts. c. 212, § 53, without distinguishing between the cases in which the Police Court had jurisdiction to impose sentence and those in which it had jurisdiction only to hold the accused for trial before the Superior Court. The words in the recognizance which have no application to the case before the Police Court may be rejected as surplusage, or "term" may be construed to mean time, and "sentence" to mean order. The recognizance cannot be construed to require the appearance of the petitioner before the Superior Court. See Pub. Sts. c. 212, § 63. *State v. Crowley*, 60 Maine, 108.

If this recognizance had been certified upon default to the Superior Court, pursuant to Pub. Sts. c. 212, § 27, and a suit had been brought upon it in that court, the petitioner might have availed himself of the provisions of Pub. Sts. c. 212, §§ 62-66, but no suit has been brought on the recognizance. By Pub. Sts. c. 212, § 71, he had a remedy if he had surrendered himself, but that section contains no provisions concerning the effect of a recapture. In the present proceeding the judgment of the Police Court adjudging the money to be forfeited cannot be annulled or quashed, because it is a judgment which that court had a right to render upon the default of the respondent in the criminal complaint then pending before that court.

Petition dismissed.

MARY MANNING vs. ANDREW CARBERRY.

Norfolk. November 17, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Contract — Action — Evidence — Witness — Agency.

An action on a contract, made by the plaintiff with an alleged agent of the defendant, cannot be maintained without proof that the alleged agent was in fact the agent of the defendant.

Evidence put in under the Pub. Sts. c. 169, § 22, to contradict a party's own witness, by showing that he has made at other times statements inconsistent with his testimony at the trial, has only the effect of discrediting the witness, and has not the effect of independent evidence.

On the issue whether the defendant authorized an alleged agent to make a certain contract, there was evidence that before the trial the alleged agent made statements in the presence of the defendant and others tending to show that he was authorized to make the contract; but the plaintiff's bill of exceptions did not show whether the defendant remained silent or not. *Held*, that there was no evidence that the defendant assented to the statements of the alleged agent.

If the defendant testifies in denial of the issue in the case, the fact that the jury may not believe him does not make his testimony affirmative evidence in support of the plaintiff's claim.

CONTRACT, for board of Hugh Carberry, from July 11, 1892, until May 6, 1896, the time of his death. Trial in the Superior Court, before *Sherman, J.*, who, at the close of the evidence for the plaintiff, ruled that there was no evidence which would authorize the jury to find for the plaintiff, and directed a verdict for the defendant. The plaintiff alleged exceptions, which appear in the opinion.

J. E. Cotter, for the plaintiff.

T. E. Grover, (*N. L. Sheldon* with him,) for the defendant.

LATHROP, J. While the bill of exceptions in this case is somewhat voluminous, as it recites all of the evidence given at the trial, the question presented is a narrow one. Hugh Carberry, for whose board the plaintiff seeks to hold the defendant liable, was the father of the parties to this action, and of John Carberry, a witness in the case. There is no doubt that there is evidence from the plaintiff's testimony which would authorize the jury in finding that John Carberry came to see the plaintiff on July 9, 1892, and represented that the defendant was going to Gloucester.

ter, and sent him down to see if she would take his father to board; that she asked whether the defendant would pay her, and John said "Yes." She further testified that the defendant made two payments, one of fifty dollars and one of ten dollars; and added, "That was all I received on account of the board and care of my father." She did not state, however, that at any time she presented a bill to the defendant, or that when these payments were made anything was said which would tend to show that the defendant made the payments as money due from him, or otherwise than as a gratuity. Nor was there any evidence when these payments were made. Her testimony a little later would tend to show, not a contract on her part with the defendant, but a solicitation for help in the support of their parent. She testified that in 1894 she said to the defendant, "I am in poor circumstances, Andy, and I think you ought to try to do something for me towards father's board"; that he said, "You will be all right, Mary, some one of these days. You will get along all right. You take good care of father, and you will be all right." There is no evidence that at any time she spoke to the defendant in regard to the contract which she testified John made with her in behalf of the defendant, although she testified that the defendant frequently came to her house while her father was living with her.

John Carberry testified that he did not remember making any arrangement with the plaintiff; that he did not remember being sent to his sister by his brother, but it might be so. This witness further testified that he called at the office of the plaintiff's counsel with the defendant, and said, in the presence of the defendant and the plaintiff, to the counsel, that his brother sent him down to make arrangements for the board of his father as long as he was away, and that his brother would pay the board.

This evidence was put in under the provisions of the Pub. Sts. c. 169, § 22, which allow a party producing a witness to contradict him by other evidence, and to prove that he has made at other times statements inconsistent with his testimony at the trial. Such evidence, however, though it discredits the witness, does not have the effect of independent evidence. *Ryerson v. Abington*, 102 Mass. 526, 530. *Day v. Cooley*, 118 Mass. 524. *Brooks v. Weeks*, 121 Mass. 433.

The plaintiff next contends that the silence of the defendant, when John Carberry made the statements in the office of the plaintiff's attorney, was evidence of the agent's authority to bind him, or amounted to a ratification of the contract. The short answer to this contention is that there is no evidence whether the defendant remained silent or not. For aught that appears, the defendant may have at once protested that he had given his brother no authority to make any contract in his behalf.

The last witness called by the plaintiff was the defendant, who testified that he sent his brother to his sister to notify her that their father was coming to her house; that he had nothing to do with any arrangement with the plaintiff for his father's board; that his father made his own arrangement, and he, the defendant, gave him the money to do so. The plaintiff contends that the jury were not bound to believe the defendant. This is true, but it does not make his testimony affirmative evidence in support of the plaintiff's claim.

We find nothing in the testimony of the witnesses for the plaintiff, whether the jury believed their testimony or disbelieved it, which would warrant a finding for the plaintiff.

Exceptions overruled.

COMMONWEALTH vs. JAMES E. LENNON.

Middlesex. November 22, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Acting as Public Officer no Defence to Complaint for violating City Ordinance.

It is no defence to a complaint for storing furniture on a sidewalk, in violation of a city ordinance which provides that no person shall place upon any sidewalk certain articles "so as to obstruct a free passage for travellers for more than fifteen minutes," that the defendant acted as a public officer in obedience to a writ of execution ordering him to cause a person to have possession of the tenement from which the furniture was removed.

COMPLAINT, to the Third District Court of Eastern Middlesex for violating c. 41, § 26 of the Revised Ordinances of the City of Cambridge, which provides that "No person shall place or cause

to be placed upon any sidewalk any lumber, iron, coal, trunk, bale, box, crate, cask, package, article, or thing whatsoever, whether of the same description or not, so as to obstruct a free passage for travellers for more than fifteen minutes."

The defendant justified under an execution duly issued by said District Court in an action brought therein to recover possession of the house described in the execution, under Pub. Sts. c. 175.

Trial in the Superior Court, before *Lilley*, J., who, at the request of the defendant, reported the case for the determination of this court, in substance as follows.

The defendant was a duly appointed constable of Cambridge, qualified to serve the execution which he served by removing the furniture of the defendant in the execution from the house, placing it partly on the street and partly on the sidewalk, and piling the same in as neat and compact a way as possible, and delivered possession of the house to the plaintiff in the execution. The defendant thereupon notified the chief of police and superintendent of streets of Cambridge that the furniture was on the street and sidewalk, and returned the execution into court.

The sidewalk was not wholly obstructed, but upon the evidence the jury would have been warranted in finding that a free passage for travellers thereon was obstructed by the furniture so placed as aforesaid, and that the same remained on the sidewalk for more than twelve hours.

The judge ruled that the defendant was not justified in placing the furniture, or any part thereof, on the street and sidewalk as alleged in the complaint, and directed a verdict of guilty with the consent of the defendant, which the jury thereupon rendered.

If the ruling was right, the verdict was to stand; otherwise the verdict was to be set aside, all further proceedings were to be stayed on the complaint, and the defendant was to be discharged therefrom, or such other order made as to the court should seem proper.

H. H. Winslow, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

HOLMES, J. The validity of the ordinance is not questioned, nor do we see any ground for questioning it. The defendant justifies on the ground that he acted as a public officer, and in obedience to a writ of execution ordering him to cause one Halli-

day to have possession of the tenement from which the furniture was removed. But the fact that the defendant was a constable did not put him above the law, and the writ did not require him to disregard it. For if we assume that the defendant's duty required him to remove the furniture irrespective of any request to him, *Fiske v. Chamberlin*, 103 Mass. 495, 496, see *Scott v. Richardson*, 2 B. Mon. (Ky.) 507, *Witbeck v. Van Rensselaer*, 64 N. Y. 27, 32, it did not require him to leave it upon the sidewalk contrary to the ordinance. There is no hardship upon the officer. He may store the goods at the owner's cost, (*Preston v. Neale*, 12 Gray, 222,) and may require a bond of indemnity from the party who calls upon him to serve the writ. *Clark v. Parkinson*, 10 Allen, 133, 136. *Hamberger v. Seavey*, 165 Mass. 505, 507. See *Commonwealth v. Miliman*, 13 S. & R. 403.

Verdict to stand.

LUDWIG WIDERSUM & others vs. ANTON BENDER & others.

Suffolk. December 5, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, BARKER, & HAMMOND, JJ.

Life Estate — Remainder — Redemption of Real Estate from Tax Sale — Fraud.

At the trial of a bill in equity under St. 1888, c. 390, § 76, to redeem real estate from a tax sale, it appeared that the plaintiff was the owner of a remainder in fee after the life estate of the defendant B., whose duty it was to pay the tax, that B. and H., who purchased the tax title a week after the sale, kept the sale secret from the plaintiff in order to cause him to lose the right of redemption, thus wrongfully conspiring to defraud him, that B. and H., more than two years and less than five years from the tax sale, joined in a deed to the defendant R. which gave him the fee, if the tax title could not be redeemed, and he gave back to H. a mortgage still outstanding. It was not alleged that R. took with notice of the right to redeem, nor that he was a party to or chargeable with knowledge of the fraud or conspiracy of B. and H., and his answer did not allege that he was a purchaser without notice and in good faith. The defendant W., who was the original purchaser at the tax sale, sold out his title immediately after the sale, and by his answer said that he had no interest in the estate. A decree was entered that the plaintiff pay to the defendant R. the original sum paid by him, with all intervening sums paid as taxes, with interest to the date of the decree, and costs, and that R. give to the plaintiff a deed of release, and that he pay to

the plaintiff the costs of suit. *Held*, that the decree was to be affirmed with costs, but with leave to the plaintiff to apply to a single justice for a modification as against B. and H., and requiring H. to release the remainder from the operation of the mortgage, and that the bill was to be dismissed as against W., but without costs.

BILL IN EQUITY, filed April 10, 1897, against Anton Bender, Caroline Reichardt, Ernst Hormel, and Willard Welch, to redeem certain real estate from a tax sale. A decree was entered in this court "that the plaintiffs pay to the defendant Caroline Reichardt the original sum paid to the collector of taxes of the city of Boston, together with all intervening sums paid as taxes upon said estate, with interest to the date of the decree, and the lawful costs, amounting to \$81.26; that the defendant Caroline Reichardt execute, acknowledge, and deliver to the plaintiffs a deed of release of the remainder in fee of said estate from the tax sale in said plaintiffs' bill set forth; and that the defendant Caroline Reichardt pay to the plaintiffs the costs of this suit, to be taxed by the clerk of this court." The defendant Reichardt appealed to the full court.

F. C. Dowd, for the defendant Reichardt.

T. F. McDonough, for the plaintiffs.

BARKER, J. The tax sale from which the plaintiffs seek to redeem took place on October 18, 1893, and this bill was filed on April 10, 1897. Under the provisions of St. 1888, c. 390, § 76, this court has equity powers in all cases of taking or sale of real estate for the payment of taxes assessed thereon, if relief is sought within five years from the taking or sale. While this provision does not in every case extend the time of redemption to five years, it allows the court to decree redemption upon a bill filed within five years from the sale, if the circumstances render it equitable. *O'Day v. Bowker*, 143 Mass. 59. See also *Smith v. Smith*, 150 Mass. 73, 74; St. 1849, c. 213, § 2; St. 1856, c. 239, § 4; Gen. Sts. c. 12, § 42; St. 1878, c. 266, § 14; Pub. Sts. c. 12, §§ 49, 66; St. 1888, c. 390, §§ 57, 76; *Mitchell v. Green*, 10 Met. 101; *Rand v. Robinson*, 11 Cush. 289; *Parker v. Baxter*, 2 Gray, 185; *Simonds v. Towne*, 4 Gray, 603; *Rogers v. Rutter*, 11 Gray, 410; *Tinslar v. Davis*, 12 Allen, 79, 80; *Faxon v. Wallace*, 98 Mass. 44; *Loud v. Charlestown*, 99 Mass. 208, 209; *Gladwin v. French*, 112 Mass. 186, 187; *Dewey v. Donovan*, 126 Mass. 335,

837; *Langley v. Chapin*, 134 Mass. 82, 88; *Sherwin v. Boston Five Cents Savings Bank*, 137 Mass. 444, 446, 447.

As there is no report of the evidence or of the facts found by the single justice, the only question brought up by the defendant's appeal is whether the decree is one which could be entered upon the bill. We think that the bill alleges circumstances which make it equitable to allow the plaintiffs to redeem. They were owners of a remainder in fee, after the life estate of the defendant Bender, whose duty it was to pay the tax. Bender and Hormel, who purchased the tax title a week after the sale, kept the sale secret from the plaintiffs in order to cause them to lose the right of redemption, and, intending to prevent the plaintiffs from redeeming, wrongfully conspired to defraud them. Bender owning the life estate and Hormel the tax title on December 3, 1896, more than two years and less than five from the tax sale, joined in a deed to the defendant Reichardt, which gave her the fee, if the tax title could not be redeemed, and she gave back to Hormel a mortgage yet outstanding. It is not alleged that Reichardt took with notice of the right to redeem, nor that she was a party to or chargeable with knowledge of the fraud or conspiracy of Bender and Hormel. But her answer does not allege that she was a purchaser without notice and in good faith, and such an allegation, if made, might not have been proved. There was nothing to prevent a finding that the appellant took her title under such circumstances as made it equitable to allow the plaintiffs to redeem.

The decree therefore cannot be reversed because of the defendant's appeal. It is evident, however, that it does not give the plaintiffs all the relief to which they are entitled. The defendant Hormel should execute and deliver a release of the plaintiffs' remainder from the operation of his mortgage. An inspection of the record shows that the single justice directed a decree for the plaintiffs as against all the defendants except Welch, the original purchaser at the tax sale, who sold out his title immediately after the sale, and who by his answer said that he had no interest in the estate. The result is, that the decree is to be affirmed with costs of the appeal, but with leave to the plaintiffs to apply to a single justice for a modification of the decree as against the defendants Bender and Hormel, and

requiring Hormel to release the plaintiffs' remainder from the operation of his mortgage, and that a decree be entered by the single justice dismissing the bill as against the defendant Welch, but without costs. *So ordered.*

HARRY J. JAQUITH, assignee, *vs.* MASSACHUSETTS BAPTIST CONVENTION & others.

Suffolk. December 6, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, BARKER, & HAMMOND, JJ.

*Husband and Wife — Conveyance — Presumption — Gift — Validity:
as to Creditors.*

Where a husband conveys land to his wife, the presumption is that it is a gift to her, and, although the presumption may be rebutted by evidence, the facts that the transfer, which was without pecuniary consideration, was made for the purpose of having the property stand in the wife's name instead of the husband's, that after such conveyance the husband and wife joined twice in mortgaging the property to raise money for his business, that at all times the insurance on the house upon the premises was taken out in his name as owner, and was never assigned to her, and that all payments of interest on a prior mortgage were made by the husband's check, are not sufficient to overcome the presumption.

If, at the time when a husband conveys land to his wife without pecuniary consideration he owed business debts, but it does not appear that he was insolvent or in contemplation of insolvency, nor that there were any creditors then existing who had not since been paid whatever at that time was due them, nor that there was not left in his hands sufficient to pay his creditors as their claims matured, and it does appear that he actually did pay until more than a year afterwards, the conclusion that the conveyance was made for the purpose of delaying or defrauding creditors is not warranted, and the conveyance will not be held to be void as to them; and the facts that, after the conveyance, the husband and wife joined twice in mortgaging the property to raise money for his business, that at all times the insurance on the house upon the premises was taken out in his name as owner, and was never assigned to her, and that all payments of interest on a prior mortgage were made by the husband's check, do not show that the property ever thereafter passed to him.

BILL IN EQUITY, filed April 22, 1897, in the Superior Court, by the assignee in insolvency of the joint and separate estates of Henry A. Davis and Henry C. Hathaway, against the Massachusetts Baptist Convention, a corporation, Ezra F. Pratt, Lizzie E. Pratt, Henry A. Richardson, Viola I. Davis, and Julius Mar-

queze, to set aside alleged fraudulent transfers of a parcel of land in Malden, and for an accounting.

At the hearing, before *Richardson*, J., the following facts were agreed.

On April 25, 1896, an involuntary petition in insolvency was filed in the Insolvency Court for Suffolk County against the defendants Henry A. Davis and Henry C. Hathaway, doing business in Boston under the firm name of Henry A. Davis and Company, and on July 3, 1896, the plaintiff was appointed assignee of the joint and separate estates of Davis and Hathaway.

On August 15, 1894, Davis bought of the defendant Ezra F. Pratt a certain parcel of land in Malden, and on the same day mortgaged the same to the defendant, the Massachusetts Baptist Convention, to secure his note for \$5,500, which mortgage was recorded. On the same day also Davis executed a second mortgage of the premises to Pratt to secure his notes for \$1,100, and that mortgage was discharged on August 23, 1895.

On September 6, 1894, Davis executed a third mortgage of the premises to his father, Elzaphan S. Davis, purporting to secure a note of \$4,000. This mortgage was subsequently discharged by a deed dated December 7, 1894, and recorded on September 30, 1895. On December 4, 1894, Davis conveyed the premises by quitclaim deed to the defendant Henry A. Richardson, his attorney, but without any consideration, and on the same day Richardson conveyed the premises by quitclaim deed to the defendant Viola I. Davis, who was the wife of Henry A. Davis, but without any consideration from her. On September 27, 1895, Henry A. and Viola I. Davis executed a mortgage of the premises to one Edward H. Lowell, to secure their joint note for \$2,500, which mortgage was recorded forthwith, and was discharged on July 7, 1896.

On April 8, 1896, Henry A. and Viola I. Davis executed a third mortgage of the premises to the defendant Marqueeze, for \$3,000, which mortgage was recorded forthwith.

On September 2, 1896, Henry A. and Viola I. Davis executed a deed of the premises to the defendant Richardson. At all times the insurance on the house upon the premises held by the Massachusetts Baptist Convention was taken out in the name of

Henry A. Davis as owner, and was never assigned to Viola I. Davis or to Richardson, and all payments of interest to the Massachusetts Baptist Convention were made by the check of Henry A. Davis.

The Massachusetts Baptist Convention entered on the premises and filed a certificate of possession on October 8, 1896, and after publishing a notice of the foreclosure sale in a newspaper on October 3, 10, and 17, 1896, sold the premises on October 26, 1896, for \$5,800, to the defendant Lizzie E. Pratt, who was the wife of Ezra F. Pratt, who recorded the deed. On the same day Lizzie E. and Ezra F. Pratt joined in a mortgage back to the Massachusetts Baptist Convention to secure a note for \$5,500, which mortgage was recorded.

The plaintiff never received actual notice of the foreclosure sale. No petition for leave to sell was ever presented to the Court of Insolvency by the Massachusetts Baptist Convention.

The sale was attended by several parties, and several bids were made. It was announced at the sale by the attorney for the Massachusetts Baptist Convention, that the corporation would take back a mortgage of \$5,500 on the property. There were no negotiations between Pratt and the Massachusetts Baptist Convention for the purchase of this property prior to the advertisement of the property at foreclosure sale, and no special terms or agreements were entered into with him. The interest on the mortgage and the taxes were unpaid, and demand for the payment thereof was made on the defendant Richardson, at that time the holder of the record title, and Richardson had actual notice of the time and place of the foreclosure sale.

The defendants Pratt thereafter expended on the premises the sum of \$1,198 in changes and repairs, and some time in 1897 exchanged their equity in the premises for certain real estate in Boston. On September 14, 1897, they sold that real estate for \$3,052.50 net.

The Pratts had known Davis for more than three years, and during that time had lived within 250 feet of the premises which were mortgaged by Davis to the Massachusetts Baptist Convention, and which had been occupied by Davis as his home up to the time when he left the Commonwealth, as hereinafter stated.

Ezra F. Pratt, in July, 1896, was surety on the recognizance

of Davis in the sum of \$1,500 on a charge against the latter of conspiracy to defraud certain persons. Davis was discharged, and immediately left the Commonwealth for New York.

The plaintiff never recorded the assignment in insolvency to him in the registry of deeds for Middlesex County, and did not notify the Pratts and the Massachusetts Baptist Convention of the insolvency of Davis and of his appointment as assignee until after December 1, 1896. The officers and agents of the corporation had no actual knowledge of the insolvency of Davis or of the appointment of the plaintiff as his assignee until after the foreclosure.

Davis returned to Massachusetts some time in December, 1896, and submitted to examination. On December 17, 1896, the plaintiff made demand on Ezra F. Pratt for papers in his possession. These papers were found by one Hinds and delivered to Pratt some time during August, 1896, after the taking possession by Pratt of personal property conveyed to him by Mrs. Davis. Pratt retained them until they were delivered to the plaintiff, on his demand, in January, 1897. Amongst them were deeds and mortgages of this property in Malden. Davis did not file in the Insolvency Court the schedule of assets required by law, and there was no knowledge on the part of the plaintiff of the existence of any rights of Davis or his creditors in the property in question until after he had examined Davis, late in December, 1896, and subsequently received from Pratt the papers pertaining to the title and mortgages on the property, in the following January.

Henry A. Davis, called as a witness by the plaintiff, testified, among other things, as follows:

"Q. Do you remember conveying this property to Henry A. Richardson some time in December, 1894? A. I remember that my wife did.—Q. December, 1894? A. Oh, yes, I do remember; I did at that time.—Q. Did you receive any payment from Mr. Richardson? A. I did not.—Q. What was the purpose? A. It was one of those cases we all do, simply transferring the property to have it stand in my wife's name instead of my own.—Q. So far as you know, nothing was paid by her to Mr. Richardson? A. No, sir.—Q. In the agreed facts there is a reference to a mortgage to Edward H. Lowell of

Chelsea; for what was that mortgage given? *A.* That was a part of a collateral security given to the Winnisimmet Bank of Chelsea on a loan of \$2,500 which I had from him for use in my business. — *Q.* Was Mr. Lowell connected with that bank? *A.* He was cashier; yes, sir. — *Q.* In giving this mortgage to Mr. Lowell, and the subsequent mortgage to Mr. Marqueze, your wife signed that at your request? *A.* She did. — *Q.* She always was willing to have this used in your business whenever you desired? *A.* Yes, sir. — *Q.* In the summer of 1894 were you indebted to Mr. Eberly at all? *A.* I was. — *Q.* To what amount? *A.* Well, the amounts varied at times; I probably owed him continually amounts varying from one to four thousand dollars. — *Q.* And this was business indebtedness? *A.* It was goods purchased. — *Q.* Have you owed him continuously since that time, more or less? *A.* Yes, sir. — *Q.* What is the least that you have owed him at one time, approximately? *A.* I don't think I ever owed him less than \$2,500. — *Q.* He appears as one of your creditors to-day? *A.* He does."

On cross-examination, the witness testified as follows:

"*Q.* You say you were indebted to Mr. Eberly; whether or not the debts which you owed him in 1894 were paid subsequently? *A.* Well, I never got square with him. — *Q.* I asked you if the debts you owed him in 1894 were or were not paid? *A.* I can't answer that question yes or no, because he always held my notes. — *Q.* What notes did he hold? *A.* My own personal notes. — *Q.* Did he ever give any of them up? *A.* As fast as they became due we paid them and they were surrendered. — *Q.* And that was continued; as they matured you gave new notes and he surrendered the old ones? *A.* We paid them all as they became due, and when goods were shipped we gave him more. — *Q.* You were in condition to pay all your notes as fast as they matured? *A.* Well, I did pay them all at that time. — *Q.* Was it after 1894 you were paying in the regular course of business? *A.* I was. — *Q.* That was all through the year 1894, was it not? *A.* As far as I know now. — *Q.* How soon did it happen you ceased? *A.* I had business reverses. — *Q.* When did it happen? *A.* It happened in the early part of 1896. — *Q.* Whether up to the beginning of 1896 you were insolvent? *A.* I don't think I was personally solvent at that time."

The judge made the following findings :

"There was no fraud or collusion between the officers of, or any person acting for, the Massachusetts Baptist Convention in respect to the foreclosure of its mortgage; and none of the allegations of fraud, combination, or conspiracy to cheat the plaintiff, contained in the bill, so far as they refer to the Massachusetts Baptist Convention or its officers, are sustained.

"The corporation had the right to foreclose its mortgage as it did, and sell the property; and all the proceedings in such sale were regular. The price paid by Mrs. Pratt for the property at said foreclosure sale was not probably, by a thousand or fifteen hundred dollars, the full value of the property at that time; but the interest on the mortgage was overdue, taxes on the estate had not been paid for one or two years, Davis had been indicted for some alleged fraud or crime and had left the State, and there was evidence tending to show that the house was in many respects out of repair.

"The chief evidence tending to show that the property did not bring its full value at the foreclosure sale was that Mrs. Pratt, after a considerable amount of repairs and the payment of taxes, in a few months exchanged her equity for a piece of land in Boston, which she subsequently sold for \$3,000; but this alone does not show that her equity over the mortgage now held by the Massachusetts Baptist Convention was worth that sum; she may have sold the land in Boston for more than its market value.

"It was not shown either that at the time the property was conveyed to Mrs. Davis, December 4, 1894, subject to the original mortgage of the Massachusetts Baptist Convention, her husband, Henry A. Davis, was insolvent or contemplating insolvency, or that he then owed debts which existed at the time he went into insolvency. If the estate did not belong to him in law or equity at the time of the commencement of the proceedings in insolvency, or if it was not shown that it had been conveyed to her by her husband through Richardson, in violation of the laws relating to insolvency and insolvent estates, the plaintiff as assignee of Davis cannot claim it.

"The result, as shown by the evidence, is that the Massachusetts Baptist Convention has a valid mortgage, and that the

plaintiff, as assignee of Davis, is not entitled to any profit made by Mrs. Pratt on her purchase and sale of the equity."

A decree was entered, dismissing the bill; and the plaintiff appealed to this court.

W. R. Bigelow, (*H. J. Jaquith* with him,) for the plaintiff.

D. P. Bailey, for the defendants.

HAMMOND, J. The conveyances prior to October, 1896, affecting the property, taken in chronological order, were as follows.

The deed of August 15, 1894, from Pratt to Henry A. Davis; the mortgage of the same date from Davis to the Massachusetts Baptist Convention; a subsequent mortgage of the same date from Davis to Pratt (discharged on the records, August 28, 1895); another mortgage of September 6, 1894, from Davis to his father (discharged December 7, 1894); a deed of December 4, 1894, from Davis to Richardson, and a deed of the same date from Richardson to Viola I., the wife of said Davis; a mortgage of April 18, 1896, from Viola and her husband to Marqueze; and a deed of September 2, 1896, from Viola and her husband to said Richardson.

At the time of the foreclosure of the mortgage held by the Massachusetts Baptist Convention, which took place in October, 1896, the record title to the property stood in Richardson, subject to this mortgage and to the mortgage given to Marqueze.

The Massachusetts Baptist Convention sold the premises at public auction to Lizzie E. Pratt, wife of Ezra F. Pratt, and the Pratts gave a mortgage back to the Massachusetts Baptist Convention to secure their note for a part of the purchase money, and this mortgage is still held by the mortgagee.

It is not denied by the plaintiff that the foreclosure proceedings were in due form.

But the plaintiff says that the conveyances of December 4, 1894, by which the record title to the property passed from Henry A. Davis to his wife were without consideration and void as to creditors, and that the conveyance of September 6, 1896, to Richardson was without consideration. It appears from the statement of agreed facts that there was no pecuniary consideration moving from the wife to the husband at the time he caused the title to pass to her. But where a husband conveys land to his wife, the presumption is that it is a gift to her, and, although

the presumption may be rebutted by evidence, we do not find in the facts agreed or in the other evidence presented sufficient evidence to overcome the presumption. It must stand as a gift to the wife, and the only remaining question on this part of the case is whether it is void as against creditors. It does not appear that at the time of the transfer the husband was insolvent or in contemplation of insolvency, or that there were any creditors then existing who have not since been paid whatever at that time was due them. Nor does the evidence warrant the conclusion that the conveyance was made for the purpose of delaying or defrauding creditors, nor does it appear that there was not left in the hands of the husband sufficient to pay his creditors as their claims matured; and he actually did pay until more than a year afterwards.

It is well settled in this Commonwealth that a conveyance of property made on a meritorious consideration as of blood or affection is not *per se* fraudulent as against creditors. This conveyance was made on a meritorious consideration,—the making of provision for a wife. It does not appear either that the grantor was indebted at the time beyond his probable means of payment remaining after the conveyance, or that it did in fact operate to hinder, delay, or defraud creditors, or that he had an actual intent to defraud subsequent creditors; that is, an intent to contract debts and a design to avoid payment of them by the conveyance; and a court is not warranted in finding such fraudulent intent from proof simply that the conveyance was made with a design to settle the property upon the grantor's wife, so that it should not be exposed to the hazards of his future business, or liable for any future debts which he might contract. *Thacher v. Phinney*, 7 Allen, 146. *Winchester v. Charter*, 12 Allen, 606.

Applying these well known principles we are not satisfied upon the evidence that this transfer to the wife is void as to creditors. Nor do we see in the subsequent transactions any evidence to satisfy us that the property ever thereafter passed to the husband.

Such being the case, the plaintiff has no standing in court to contest the foreclosure proceedings, and the other questions discussed by counsel become immaterial. *Decree affirmed*

PORTLAND STEAMSHIP COMPANY vs. MARY E. DANA,
executrix, & another.

Suffolk. December 13, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Trust — Money Deposited in Bank — Check — Equity — Appeal — Decree.

A bill in equity by a steamship company against the executor of A.'s will alleged that A. was the plaintiff's agent in forwarding merchandise brought to a port by its steamboats, and in collecting freight on its behalf from the consignees; that he had collected freight money to a certain amount, which he had neglected to turn over, but sent his check for the amount to the plaintiff with the request that it be held until the deposit to his credit in the bank would be sufficient to meet it; that he died two days afterwards, before the check was made good; but immediately thereafter his former clerk deposited money to the exact amount and for the specific purpose of paying the check; that the check was then presented to the bank, but payment was refused; that the bank, although notified that the money belonged to the plaintiff, paid it to the defendant as executor; and that a demand was made by the plaintiff on the defendant, who refused to pay the same to the plaintiff. *Held*, upon an appeal from a decree declaring, in accord with prayers in the bill, that the money was held by the defendant as trustee for the plaintiff's benefit, and ordering the defendant to pay the same to the plaintiff, with interest and costs, there being no report of the evidence, that the decree was warranted.

BILL IN EQUITY, filed July 13, 1897, in the Superior Court, against the executrix of the will of Isaac D. Dana and the Atlas National Bank, to recover money alleged to belong to and to be held in trust for the plaintiff by the defendant Dana. A decree was entered for the plaintiff; and the defendant Dana appealed to this court. The facts appear in the opinion.

W. F. Harding & R. E. Harding, (H. J. Edwards with them,) for the defendant Dana.

E. P. Payson & N. U. Walker, for the plaintiff.

LATHROP, J. This case comes before us on appeal by Mrs. Dana, as executrix, from a decree of the Superior Court, declaring that \$240 of the \$250 withdrawn by her from the Atlas National Bank is held by her as trustee for the benefit of the plaintiff, and ordering her forthwith to pay to the plaintiff the sum of \$240, with interest thereon from March 13, 1897, with

costs. The only papers printed in the record are the bill, answer, decree, and appeal, and a statement that issue was joined.

We must assume that the case was not heard on the bill and answer, but that there was a hearing of the case on the merits. As no evidence is presented to us, the only question is whether the decree conforms to the allegations and prayers of the bill. *Iasigi v. Chicago, Burlington, & Quincy Railroad*, 129 Mass. 46. *O'Hare v. Downing*, 130 Mass. 16. *Weld v. Walker*, 130 Mass. 422.

It is stated in the plaintiff's brief that the defendant bank filed a demurrer, and, upon a hearing, the bill was dismissed as to this defendant. We need therefore concern ourselves only with the question whether the decree against Mrs. Dana was warranted.

The facts as alleged in the bill are in substance that one Isaac D. Dana was the agent of the plaintiff in forwarding merchandise brought to Boston by the plaintiff's steamboats, and in collecting freight on behalf of the plaintiff from the various consignees; that he had collected freight money to the amount of \$250, which he had neglected to turn over; but in lieu thereof, on February 27, 1897, sent his personal check for said amount to the plaintiff, with the request that it hold it for a few days until the deposit to his credit in the bank would be sufficient to meet it; that Dana died on March 1, 1897, before the check was made good, but immediately thereafter there was deposited by one Woodbury, his former clerk, money to the exact amount and for the specific purpose of paying the check of \$250, thus making good the money collected by Dana and belonging to the plaintiff, and which he had neglected to turn over; that the check was thereafter presented to the bank for payment, but, the statutory limitation in such cases provided having run, (see St. 1885, c. 210, § 2,) the bank refused to pay the same; that the bank was forthwith notified that the money belonged to the plaintiff and was set apart in trust as the plaintiff's property; but the bank refused to pay the money to the plaintiff, and paid it to Mrs. Dana, as executrix of her husband's estate; and that a demand was made by the plaintiff on Mrs. Dana, and she refused to pay the same to the plaintiff. Some of the prayers

of the bill were in exact accord with the decree, and need not be further stated.

The relation between Isaac D. Dana and the plaintiff was not that of debtor and creditor, and money collected by Dana for the plaintiff was held by him in a fiduciary capacity, or as trustee for the plaintiff. If he in his lifetime had deposited such money in a bank, although in his own name, the fund would have been impressed with the trust, and the plaintiff could have had the trust declared by a bill in equity brought against the bank. *Knatchbull v. Hallett*, 13 Ch. D. 696. *National Bank v. Insurance Co.* 104 U. S. 54. *Cavin v. Gleason*, 105 N. Y. 256. *Springfield Institution for Savings v. Copeland*, 160 Mass. 380, 384.

We cannot assume, in the face of the decree and in the absence of evidence, that the money which Woodbury deposited to meet the check belonged to the general estate of Dana, rather than to the trust fund which Dana had not paid over. As the defendant has not seen fit to bring up the evidence, or to ask the judge to report the facts, we are of opinion that any doubt on this point must be resolved against the defendant.

In this view of the case, the amount deposited did not become assets of the estate, and the payment of the money by the bank to Mrs. Dana did not make it assets, nor can she hold it as executrix. *Farrelly v. Ladd*, 10 Allen, 127.

Decree affirmed.

UNITED STATES NATIONAL BANK vs. CLARENCE
H. VENNER.

Suffolk. December 16, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Judgment — National Bank — Name — Variance — Finding.

In an action upon a judgment recovered in another State, the writ described the plaintiff as "the United States National Bank of New York, N. Y., . . . having its usual place of business in the city and State of New York." The plaintiff

put in evidence certified copies from the comptroller of the currency of documents showing the incorporation and existence of a national bank under the name of "The United States National Bank of the City of New York," and also evidence tending to prove the identity of the bank that recovered the judgment with the present plaintiff, and that there was not in New York any other bank having the same or a similar name. The judgment roll recited that the judgment was rendered in favor of "The United States National Bank," and the complaint set forth that the plaintiff therein was organized under the National Bank Act, "and carrying on business in the city of New York as a National Bank." *Held*, that no material variance, if any, was shown; and that a finding for the plaintiff was warranted.

CONTRACT on a judgment, alleged to have been recovered by the plaintiff against the defendant in the Supreme Court of New York. Trial in the Superior Court, without a jury, before *Hammond, J.*, who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

C. F. Choate, Jr. & A. F. Clark, for the defendant, submitted the case on a brief.

F. Dodge, (*C. Walcott* with him,) for the plaintiff.

LATHROP, J. The writ in this case describes the plaintiff as the United States National Bank of New York, N. Y., a banking association or corporation duly established by law, being duly organized and incorporated under the laws of the United States of America, and having its usual place of business in the city and State of New York.

The declaration is as follows: "And the plaintiff says that by the consideration of the Supreme Court of the State of New York, held at New York for the city and county of New York, in said State of New York, on the 7th day of January, 1897, it duly recovered judgment against the defendant for \$7,428.25 debt or damage, together with \$1,221.95 interest, and costs of suit taxed at \$118.40, amounting in all to \$8,768.60; that said judgment has never been vacated, set aside, or satisfied, and now remains in full force and effect, as appears from the records of said court; and the defendant owes it the amount of said judgment, with interest."

The answer was a general denial. There was also filed by the defendant a special demand for proof "of the incorporation of the United States National Bank of New York, N. Y., plaintiff."

At the trial, the plaintiff put in evidence certified copies from

the comptroller of the currency of its articles of association, its organization certificate, and the certificate authorizing it to do business. These documents showed the incorporation and existence of a National Bank under the name of "The United States National Bank of the City of New York."

The plaintiff put in evidence the judgment roll of the Supreme Court of New York, duly authenticated as required by the Pub. Sts. c. 169, § 67, and the U. S. Rev. Sts. § 905. The plaintiff also put in evidence tending to prove the identity of the bank that recovered the judgment with the plaintiff in this action, and evidence tending to show that there was not in New York any other bank having the same or a similar name. The defendant put in no evidence, and asked the judge to rule that the plaintiff could not recover. The judge refused so to rule, and found for the plaintiff.

The only ground urged by the defendant in this court in favor of his request for a ruling is that there is a variance between the allegation and the proof, in that the writ describes the plaintiff as the United States National Bank of New York, whereas the judgment was in favor of the "United States National Bank." But an examination of the judgment roll shows that, while the judgment was rendered in favor of "The United States National Bank," called in one place in the roll the "United States National Bank," the complaint sets forth that the plaintiff is "an association or corporation duly organized and existing under the Act of Congress of the United States known as the National Bank Act, and carrying on business in the city of New York as a national bank."

We are of opinion that there is no merit in the defence. If the defect had been specifically pointed out in the Superior Court, the writ could have been amended by setting forth with accuracy the name of the plaintiff, and by alleging in the declaration that the plaintiff recovered judgment in the name of the United States National Bank. And if we considered it necessary that this should be done, we should not send the case back for a new trial, as the amendment could be made in the Superior Court at any time before judgment. *Cleaves v. Lord*, 3 Gray, 66. *Nichols v. Prince*, 8 Allen, 404, 408. *Denham v. Bryant*, 139 Mass. 110, 112.

It is obvious, however, that the words in the writ in the present action "of New York, N. Y.," do not necessarily import to be a part of the plaintiff's name, but may be considered as descriptive only. If so there is no variance. *Thatcher v. West River National Bank*, 19 Mich. 196.

But if the words "of New York, N. Y.," are considered as part of the title of the bank, we are of opinion that no material variance is shown. In *Washington County National Bank v. Lee*, 112 Mass. 521, the writ described the plaintiff as "the Washington County National Bank, a corporation duly established by law and doing business in Greenwich, in the State of New York." To prove its corporate existence, it put in evidence an organization certificate of "The Washington County National Bank of Greenwich," to be located in the town of Greenwich, County of Washington and State of New York, and a certificate of the comptroller of the currency that "the Washington County National Bank of Greenwich in the County of Washington and State of New York" had been duly organized. It was contended that, on account of the variance of name, there was no proof of the organization of the plaintiff as a corporation. But it was held that, "In the absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation." See also *Thatcher v. West River National Bank*, *ubi supra*.

The question before the court in the case at bar was whether the plaintiff in this action was the same plaintiff that recovered the judgment declared on. There can be no doubt that the judge was amply warranted in finding that it was.

Exceptions overruled.

NELLIE E. BOYLAN vs. AMELIA F. EVERETT & another.

Norfolk. December 16, 1898. — January 7, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Instructions — Law and Fact — "Bite of Dog" — Exceptions.

At the trial of an action for injuries caused by the bite of a dog, the plaintiff requested a ruling that, "upon the undisputed and admitted facts in this case, the only question for the jury to determine is one of damages." The bill of exceptions did not state that it contained all of the evidence material to the issue involved. *Held*, that the question whether the defendant was a keeper of the dog, within the Pub. Sts. c. 102, § 98, was a question of fact for the jury, and that the instruction requested was rightly refused.

No exception lies to the refusal to give an instruction which is given in substance.

At the trial of an action, under Pub. Sts. c. 102, § 98, for injuries caused by the bite of a dog, the plaintiff requested a ruling that "where a person allows a dog to be on his premises, occasionally feeding and petting it, sometimes calling it and commanding its obedience, or simply permitting the dog, so to say, to be one of the family, he then is the keeper of the dog, and becomes liable for any damage caused by it." The defendant testified that she "fed and caressed the dog, called it in and sent it out, that it was treated the same as anybody would that had a dog at their home," and that when her nephew was away she took care of it. *Held*, that the judge was not required to rule, as matter of law, that the defendant was the keeper of the dog, irrespective of the fact that the dog belonged to the nephew, who boarded with her.

Because it appears that the defendant, in an action under Pub. Sts. c. 102, § 98, for injuries caused by the bite of a dog, exercised some control over and had some custody of the dog, it does not follow that the plaintiff is entitled to a ruling, as matter of law, that the defendant was responsible for the dog as keeper.

At the trial of an action under Pub. Sts. c. 102, § 98, for injuries caused by the bite of a dog, the plaintiff is not entitled, as matter of law, to a ruling that "if the dog belonged to the defendant's nephew and he kept him on the defendant's premises with his consent, and the defendant did anything to maintain or keep him, gave him food or protected him or provided for him in any way, he would be, in the sense of the law, keeper of the dog," if, while the acts recited may be evidence of keepership, more or less significant according to the other facts appearing in the case, it cannot be said that they are conclusive.

Where an exception taken to the charge to the jury is only so far as it is inconsistent with requests for rulings which were rightly refused, the exception must be overruled.

TORT, for injuries caused by the bite of a dog, which the plaintiff alleged was kept by the defendants. At the trial in the Superior Court, before *Sherman, J.*, there was evidence tending to show that the injury occurred on July 17, 1897, as the plaintiff was walking along a public highway which passed the

defendants' residence in Medfield. The defendants, aged persons, a widow and her unmarried sister in law, "kept the house," furnished the provisions and all things for its support, and the premises were under their exclusive possession and control. Their nephew, William H. Everett, who was over twenty-one years old, boarded with them, and had done so since 1878, except for a few months in 1893, when he lived in Boston. In 1891 he bought a dog which he brought to the house, where it was kept, with the defendants' consent, until after the injury to the plaintiff, he paying the license for the dog each year. The defendants testified that they "fed and caressed the dog, called it in and sent it out, that it was treated the same as anybody would that had a dog at their home," and when the nephew was away they took care of it.

The plaintiff requested the judge to rule:

"1. Upon the undisputed and admitted facts in this case the only question for the jury to determine is one of damages. 2. The keeper of a dog is one who harbors it, or exercises control over it, although to be a keeper of a dog it is not necessary that one should have the whole or entire control of the dog, and there may be several keepers of the same dog, any one of whom might be liable for damage caused by it. Where a person allows a dog to be on his premises, occasionally feeding and petting it, sometimes calling it and commanding its obedience, or simply permitting the dog, so to say, to be one of the family, he then is the keeper of the dog, and becomes liable for any damage caused by it. 3. It is for the jury to say, upon the evidence, whether they believe that the plaintiff has shown by a fair preponderance of all the evidence in the case, that the defendants had some control and custody over the dog. If they did, they are responsible for him as keepers. 4. If the dog belonged to the defendants' nephew, William H. Everett, and he kept him on the defendants' premises with their consent, and they did anything to maintain or keep him, gave him food or protected him, or provided for him in any way, they would be, in the sense of the law, keepers of the dog."

The judge refused to rule in the language of the prayers, and read the following extract from the opinion in *Whittemore v. Thomas*, 153 Mass. 347, 349:

"The evidence undoubtedly shows that, though the defendant was not the owner of the dog, it was kept on his premises with his knowledge and acquiescence. But while it is true that a person not the owner of a dog may be liable as its keeper, the mere fact that a dog is kept by its owner on the premises of another with the knowledge, or acquiescence, or permission of the owner of such premises, does not of itself make the owner of said premises the keeper of the dog. *Collingill v. Haverhill*, 128 Mass. 218.

"If the contrary were true, then a landlord might be liable as the keeper of a dog which belonged to and was at all times in the possession and control of a tenant or boarder, or even of a guest of a tenant or boarder. The law does not require the owner or occupant of premises to eject every dog that may be or may come upon them, at the risk, unless he does so, of being adjudged its keeper. No doubt a dog may be upon the premises of another under such circumstances that a jury would be warranted in finding that the owner of such premises was the keeper of it. . . . And when the facts are not in dispute, or are substantially agreed, the court may rule upon the question as matter of law, provided there are no inferences to be drawn from the facts in proof. . . . In the present case, while certain material facts were undisputed, other material facts, with the inferences to be drawn from the facts in proof, were in controversy. Thus, except the remark by the defendant, testified to by the plaintiff's husband and denied by the defendant, that the dog kept close watch on the hogs, there was no direct testimony that the dog was on the premises 'for the benefit or in the interest of the defendant,' which was evidently regarded in *Collingill v. Haverhill*, *ubi supra*, as one of the elements there entering into the question whether the defendant was or was not the keeper. It is possible that the jury might have inferred from all the testimony in the case that the dog was on the defendant's premises for his benefit or in his interest; but it was plainly for the jury, and not the court, to draw the inference. The conversation with the defendant, also testified to by the plaintiff's husband, and which implied an admission of liability by the defendant, was also contradicted by him. There was likewise evidence that the defendant exercised no control over the dog, . . . and did not

interfere with the management of it by Rogers, and had nothing whatever to do with it, and that he did not feed it or pay the license for it, and simply acquiesced in the keeping of it by Rogers at the farm. We cannot say, upon this and other testimony in the case, that the jury would not have found that the defendant was not the keeper of the dog."

The judge continued :

"Where there is a dispute about what is done by the alleged keeper, and how he has acted, then it is for the jury to say whether it is mere acquiescence on the part of the persons who are alleged to be the keepers, or whether they are in fact the keepers of the dog, or some of the keepers of the dog, — because I suppose a dog may have more than one keeper. The court say, in that case, the mere fact that a person allows a dog to be kept upon his premises by another person does not of itself make the owner of the premises liable, and you can see that would be so.

"Here the plaintiff seeks to make these defendants liable upon the ground that they have become the keepers of it, that they have assumed control over it, and management over it, and custody over it to the extent that you can find that they are the keepers; while the defendants, on the other hand, contend that all these defendants did was to acquiesce in its being kept, and that they caressed it, and fed it; and when the master was away, they turned it out of doors when it ought to be turned out, and have let it in when it ought to come in, because the master was away for the time being; that that was all they did, they acquiesced in their nephew's keeping it there, and that therefore they are not the keepers. The plaintiff, on the other hand, says, 'Yes, you became the keepers,' you have assumed control and management and custody of that dog, and you are the keepers. All that it is proper for me to say is, that the Supreme Court have said that that is a question of fact for the jury, and they must determine whether these defendants did become the keepers of that dog. If they became the keepers of the dog in the sense which I have stated, then they are liable, although they are not the owners, and therefore it is important for you to decide whether they were, at the time when the dog bit the plaintiff, the keepers of the dog.

"If you find that they were not, they are not liable, and as I stated to learned counsel, you may assume they liked the dog, and that they caressed it, that they let it out of doors and let it in, because that is not in dispute; you may assume they fed it when the owner was away, and I do not know but when he was there; you may assume all that is not in dispute, and all that has been offered in evidence by the plaintiff of what the defendants did. If you determine that the nephew was not only the owner but the keeper, and that the defendants were not, then your verdict should be for the defendants. If you find that they were the keepers with the nephew, or without him, then they are liable."

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

T. E. Grover, for the plaintiff.

P. H. Cooney, for the defendants.

LATHROP, J. The bill of exceptions in this case does not state that it contains all of the evidence material to the issue involved, and the question whether the defendants were the keepers of the dog, within the Pub. Sts. c. 102, § 98, was a question of fact for the jury. *Barrett v. Malden & Melrose Railroad*, 3 Allen, 101. *Collingill v. Haverhill*, 128 Mass. 218. *McLaughlin v. Kemp*, 152 Mass. 7. *Whittemore v. Thomas*, 153 Mass. 347. *O'Donnell v. Pollock*, 170 Mass. 441. The first instruction requested was, therefore, rightly refused.

The first part of the second instruction requested was given in substance. We do not think that the judge was required to give the last part of this request as matter of law: "The mere fact that a dog is kept by its owner on the premises of another with the knowledge, or acquiescence, or permission of the owner of such premises, does not of itself make the owner of said premises the keeper of the dog." *Whittemore v. Thomas*, *ubi supra*. Nor can we say that the facts that the defendants fed and caressed the dog, called it in and sent it out, and that it was treated "the same as anybody would that had a dog at their home," which is the testimony of the defendants, and which we assume to be the meaning of the last part of the second request, required the judge to rule, as matter of law, that the defendants were therefore the keepers of the dog, irrespective of the fact

that the dog belonged to their nephew, who was a boarder with them.

As to the third request we do not think that if the defendants exercised some control over and had some custody of the dog, it therefore followed that the plaintiff was entitled to a ruling, as matter of law, that the defendants were responsible for him as keepers.

We are further of opinion that the judge was not bound, as matter of law, to give the fourth ruling requested. While the acts recited may be evidence of keepership, more or less significant according to the other facts appearing in the case, it cannot be said that they are conclusive.

The exception taken to the charge is only so far as it is inconsistent with the requests made. It seems to us that the requests were rightly refused; and that the case was properly submitted to the jury on the evidence. *Exceptions overruled.*

MARGARET G. COUPE vs. MARGARET J. PLATT.

Bristol. October 25, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Use in Tenant's Right of outside Steps and Platform maintained by Landlord.

Where, in an action for personal injuries, it appears that the defendant was a landlord, who maintained outside steps and a platform for the use in common of tenants of different parts of the building, and that the plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to come on a particular day for a particular purpose, a verdict for the plaintiff will not be disturbed, as he was using the platform in the tenant's right.

TORT, for personal injuries. At the trial in the Superior Court, before *Blodgett, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

R. F. Raymond, for the defendant.

M. R. Hitch, for the plaintiff.

KNOWLTON, J. The question how far a host is liable to his guest for the unsafe condition of his premises, when he is visited upon an invitation, express or implied, merely in a social way, from considerations of friendship or for pleasure, is not raised by this bill of exceptions. The judge assumed in favor of the defendant that the law of this Commonwealth is like that of England, where it is held that, in the absence of traps, neither the poor nor the rich are bound to change the conditions in which they are accustomed to live in order to furnish for their friends or guests, recipients of their gratuitous hospitality, safer or more comfortable surroundings than they have for themselves and their families. The English law on this subject was somewhat considered in *Hart v. Cole*, 156 Mass. 475, 478, and in *Plummer v. Dill*, 156 Mass. 426, but whether it is to be followed in this Commonwealth has never been decided.

The question in this case is different. The defendant was a landlord who maintained outside steps and a platform for the use in common of tenants of different parts of her building. The plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to come on a particular day for a particular purpose. The duty of the defendant to keep the platform safe for the tenant, and for those claiming under him, grew out of the contract of hiring. It was a part of the contract that the platform should be kept reasonably safe for the tenant for use in connection with his tenement. The contract impliedly included, not only the tenant himself, but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such persons might be received there by the tenant. It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and in his right. To all such persons, by virtue of her contract with the tenant, the landlord owed the same duty that she owed to the tenant personally, to keep the platform reasonably safe. Whether the tenant would or would not have been liable to the plaintiff for an injury received from an unsafe condition of the tenement which he occupied, he expressly authorized the plain-

tiff to pass over the platform in the exercise of his rights under the contract with the defendant, and the defendant owed the plaintiff the duty which arose from the contract in favor of those who were acting by express authority of the tenant in the tenant's right. *Wilcox v. Zane*, 167 Mass. 802.

Exceptions overruled.

SPECIALTY GLASS COMPANY vs. MICHAEL R. DALEY.

Bristol. October 25, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Contract — Agreement to accept a Part of a Debt in Payment for the Whole —
Compromise of Disputed Claim.*

An agreement to accept a part of a debt in payment for the whole is not binding unless it is made by an instrument under seal.

Where there is no dispute or uncertainty about the amount of a debt, the rule in regard to the compromise of disputed claims and the settlement of unliquidated and doubtful claims does not apply.

CONTRACT, for goods sold and delivered. Trial in the Superior Court, without a jury, before *Dewey, J.*, who found for the plaintiff, and, at the request of the parties, reported the case for the consideration of this court. If there was evidence to warrant a finding for the defendant, judgment was to be entered for him; otherwise, judgment was to be entered for the plaintiff for forty-three dollars and fifty cents, and interest from February 18, 1896, that being the date when the goods were sold and delivered. The facts appear in the opinion.

C. R. Cummings, (*J. W. Cummings* with him,) for the defendant.

F. A. Pease, for the plaintiff.

KNOWLTON, J. The defendant owed the plaintiff forty-eight dollars and thirty-three cents for goods sold and delivered. On receipt of a bill demanding payment, he referred the matter to his attorney, who wrote the plaintiff a letter purporting to be written by him as the attorney of the defendant, offering to pay ten per cent of the debt in full settlement. This offer the

plaintiff refused by letter, and in a later letter, directed to the "Assignee of M. R. Dailey," sent the account with proof of the indebtedness. This account the defendant's attorney returned in a letter, the last sentence of which is as follows: "If you will send your bill to him [the defendant] he will pay you a dividend of ten per cent." About a fortnight later the attorney enclosed his own check for four dollars and eighty-three cents in a letter to the plaintiff, in which he said that he sent it in full settlement of the bill. All of these letters to the plaintiff were written in such a way as to indicate that the writer was acting throughout as the attorney for the defendant. The plaintiff acknowledged receipt of the check as a dividend on account, but declined to accept it as a settlement. It obtained cash on the check, and gave the defendant credit for it on account. The money against which the check was drawn was furnished by the defendant's wife, but the plaintiff had no knowledge of this.

As between the parties, the case stands as if the money had belonged to the defendant. *Spaulding v. Kendrick*, ante, 71.

Even if it could be found that the plaintiff's conduct amounted to an agreement to accept the check in settlement of the debt, which we do not intimate, the case would come within the rule which is well established in Massachusetts, that an agreement to accept a part of a debt in payment for the whole is not binding unless it is made by an instrument under seal. *Harriman v. Harriman*, 12 Gray, 841. *Potter v. Green*, 6 Allen, 442. *Jennings v. Chase*, 10 Allen, 526. *Lathrop v. Page*, 129 Mass. 19. *Slade v. Mutrie*, 156 Mass. 19.

There was no dispute or uncertainty about the amount of the debt, and the rule in regard to the compromise of disputed claims and the settlement of unliquidated and doubtful claims does not apply. *Tompkins v. Hill*, 145 Mass. 879.

Judgment for the plaintiff on the finding.

HENRY K. WHITE vs. MOUNT PLEASANT MILLS
CORPORATION.

Bristol. October 25, 26, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Money Had and Received — Corporation — Contract — Action.

A., a minor, subscribed and paid for ten shares of the capital stock of a corporation, which never issued any certificates and never carried on the business for which it was organized. The subscribers to its stock voted to form a new corporation, and such corporation was subsequently formed. It was agreed between the two corporations that the new one should pay the old one a certain sum for all its property, and that the old one should pay back a certain part of that sum, in consideration of which the new one agreed to issue certificates of its stock to that amount to the subscribers for stock of the old one, each of them to have a certificate of stock in the new one for the same number of shares paid for by him to the old one. These agreements, of which A. had knowledge, were fully carried out by the two corporations, and the new corporation issued to A. a certificate for ten shares of its stock. He afterwards tendered back to that corporation the certificate, and demanded his money. *Held*, that he could not maintain an action against that corporation for money had and received.

CONTRACT, upon an account annexed, for money had and received. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

T. F. Desmond, for the plaintiff.

M. R. Hitch, for the defendant.

KNOWLTON, J. This is an action to recover one thousand dollars for money had and received to the plaintiff's use. At the trial, the plaintiff discontinued against the New Bedford Cotton Waste Corporation, and elected to proceed against the Mount Pleasant Mills Corporation alone. The first mentioned corporation was organized under the general laws, and the plaintiff subscribed for ten shares of its capital stock of one hundred dollars each, and paid to the treasurer one thousand dollars, the amount of his subscription. On account of difficulties and misunderstandings affecting its prospects, the officers and subscribers to the stock of this corporation voted to form a new corporation, to be called the Mount Pleasant Mills Corporation, with the same

amount of capital stock as the original corporation; and the new corporation was subsequently formed. At a meeting of the first mentioned corporation, votes were unanimously passed to sell all of its property to the new corporation, to wind up its affairs, and to take legal steps to procure its dissolution. It was agreed between the two corporations that the Mount Pleasant Mills Corporation should pay to the New Bedford Cotton Waste Corporation eleven thousand three hundred dollars for all its property, and that the Cotton Waste Corporation should pay back, of the eleven thousand three hundred dollars received by it, eleven thousand dollars, in consideration of which the Mount Pleasant Mills Corporation agreed to issue at par certificates of its stock to the amount of eleven thousand dollars to the subscribers for stock of the Cotton Waste Corporation who had paid in their subscriptions in full, each subscriber for stock in the Cotton Waste Corporation to have a certificate of stock in the Mount Pleasant Mills Corporation for the same number of shares paid for by such subscriber to the Cotton Waste Corporation. The amount of capital stock paid in in full to the Cotton Waste Corporation was eleven thousand dollars, which eleven thousand dollars included the amount of the plaintiff's subscription and payment. These agreements were fully carried out by the two corporations, and thereafter the Mount Pleasant Mills Corporation issued to the plaintiff a certificate for ten shares of the stock of the Mount Pleasant Mills Corporation, representing one thousand dollars. The Cotton Waste Corporation never carried on the business for which it was organized, and never issued any certificates of stock, but gave the plaintiff a receipt entitling him to ten shares of its capital stock.

At the time of all these transactions the plaintiff was under the age of twenty-one years. He had knowledge of all these agreements, and consented to them*so far as he was legally capable of consenting. He has tendered back to the Mount Pleasant Mills Corporation his certificate of stock, and has demanded one thousand dollars. The only ground on which he seeks to maintain his action is that his agreements were not binding upon him, and that as a minor he ought to be permitted to recover back the money that he paid.

His first difficulty is that the defendant made no contract

with him. The only contract under which it acted in issuing to him the certificate was made with the Cotton Waste Corporation for a consideration received from it. Secondly, the defendant fully performed, according to its terms, the only contract that it made. For the sum of eleven thousand dollars, paid by the Cotton Waste Corporation, it agreed to issue certificates to certain stockholders of that corporation who had paid for their stock, and who were willing to receive stock in the new corporation instead of stock in the old. Assuming that the plaintiff might demand back his money, and maintain an action against the Cotton Waste Corporation, he has no such right against the new corporation. He paid no money to the new corporation, but his only payment was to the old. His money was mingled with the other money of the Cotton Waste Corporation, and it cannot be followed as a separate payment or a distinct fund into the hands of the present defendant. The finding for the defendant was correct. See *Exchange Bank v. Rice*, 107 Mass. 37, 43; *Marston v. Bigelow*, 150 Mass. 45, 51; *Borden v. Boardman*, 157 Mass. 410, and cases cited. *Judgment affirmed.*

BENJAMIN F. SPINNEY & another vs. CITY OF LYNN.

Essex. November 3, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Taxation of Personal Property situated out of the State — Action.

In an action to recover the amount of a tax paid under protest, it appeared that the plaintiffs with one M. lived in the defendant city but carried on no business there, that they were copartners having a factory in N. in another State, and that the tax in question was assessed on account of their partnership property there situated. The judge was warranted in finding that B. in this Commonwealth was the place of business of the firm. *Held*, that, under Pub. Sts. c. 11, § 24, the property was taxable in B., and that the action could be maintained.

CONTRACT, to recover the amount of a tax assessed by the defendant to the plaintiffs on May 1, 1896, and paid under protest. Trial in the Superior Court, without a jury, before *Sheldon*, J., who ruled that, upon the evidence, he was warranted in finding for the plaintiffs, and so found for a sum stated; and

reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the finding for the plaintiffs; otherwise, the finding was to be set aside and a new trial granted. The nature of the evidence appears in the opinion.

S. Parsons & E. T. McCarthy, for the defendant.

C. K. Cobb, for the plaintiffs.

LATHROP, J. The evidence in the case shows these facts. The plaintiffs, together with one Marston, lived in the defendant city. They were copartners in business, having a factory in Norway, Maine, and we assume for the present their place of business was in Boston. They carried on no business in Lynn. The tax in question was assessed upon the plaintiffs on account of their property in Norway. This was all partnership property, and was properly taxable to them in this Commonwealth, under the Pub. Sts. c. 11, § 24, in the place where their business was carried on, namely, Boston. It was, therefore, not taxable in Lynn. *Peabody v. County Commissioners*, 10 Gray, 97. *Hoadley v. County Commissioners*, 105 Mass. 519. *Ricker v. American Loan & Trust Co.* 140 Mass. 346.

In *Bemis v. Boston*, 14 Allen, 366, relied on by the defendant, the place of business was not in this Commonwealth. The firm had goods stored in a warehouse in Boston, but had no place of business in that city, the business of the firm being transacted in another State. One of the partners resided in Boston, and his interest in the property of the firm was held to be properly taxable in Boston. The case was decided on the ground that the Gen. Sts. c. 11, § 15, (which is § 24 of the Pub. Sts. c. 11,) did not apply where the place of business of the firm was out of the Commonwealth.

In the case at bar, the judge would have been warranted in finding that Boston was the place of business of the firm. The merchandise was bought in Boston, orders for goods were received there, and a large part of the goods were delivered from that city. The books were kept there, and the banking business was done there.

The ruling, therefore, was right; and, in accordance with the terms of the report, the entry must be,

Judgment on the finding.

WILLIAM C. JOHNSTON vs. EDWIN FAXON & another.

Suffolk. November 10, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Breach of Contract — Damages — Statute of Frauds.

In an action for breach of a contract to build and deliver within a specified time a stated number of bicycles of a certain kind for a price named, the retail price being fixed by a subsequent agreement between the parties, if the plaintiff was obliged to cancel orders which he had received for machines at that price covering more than the number agreed to be made by the defendant, the measure of damages is the difference between the contract price and the value of the machines if furnished, as evidenced by the orders and the agreement as to the retail price. The admissibility of a contract for the sale of chattels to prove value is not affected by the question whether it was good or bad under the statute of frauds.

CONTRACT, for breach of a written contract to furnish the plaintiff with a quantity of bicycles. Trial in the Superior Court, before *Hardy, J.*, who directed the jury to return a verdict for the plaintiff in the sum of one dollar; and he alleged exceptions. The facts appear in the opinion.

W. M. Lindsay, (*C. E. Todd* with him,) for the plaintiff.

C. B. Southard, (*T. Parker* with him,) for the defendants.

HOLMES, J. This is an action for breach of a contract to build for the plaintiff, a retail dealer, three hundred bicycles of a certain kind "to be delivered . . . as said Johnston may direct, from January 1, 1895, to July 1, 1895." The defendants broke the contract, and the plaintiff was obliged to cancel most of the orders which he had received, amounting in all to more than three hundred. The plaintiff was to pay the defendants fifty dollars a bicycle. The retail price, as fixed by subsequent agreement between the plaintiff and defendants, was one hundred and fifty dollars. This, or near it, was the price on the orders. The auditor, and the judge of the Superior Court after him, ruled that the plaintiff could recover only nominal damages, although, if the loss of the orders would not be too remote, his damage was found to be upwards of fourteen thousand dollars. The plaintiff excepted.

This court has gone a good way in refusing to allow profits to be recovered for, on the ground that they were too remote. *Todd v. Keene*, 167 Mass. 157. *Noble v. Hand*, 163 Mass. 289. But

of course the anticipation of profit, although sometimes disguised under the name of value, constantly is taken into account. If we say that the rule of damages in a case like this is the difference between the contract price and the value of the machines if furnished, the question arises whether, supposing the plaintiff to have been unable to get the machines elsewhere in time for the season, which was over before July 1, the value should not be determined by the orders and the agreement with the defendants, which would be allowing for the anticipation of profit under another name. *Griffin v. Colver*, 16 N. Y. 489, 491. The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that that was the object of the agreement. Especially in view of the part they took in fixing the retail price, they must be taken to have expected that the wheels would be sold at an advance. The article was not one to be purchased generally in the market, and therefore they knew that the plaintiff's chance to make the difference between their price and his would depend upon their doing what they undertook.

It is true that the agreement as to the retail price was made in January, 1895, and that the orders came in from December, 1894, to June, 1895, while the contract was made in November, 1894. But we presume that the defendants would not care to argue that there was any unexpected rise in retail market values between November and January. Moreover, if the liability were made out in other respects, it might be held that the defendants by their contract adopted whatever might turn out to be the retail price at the time and place of delivery. *Shaw v. Nudd*, 8 Pick. 9. *Quarles v. George*, 23 Pick. 400. *Harvey v. Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421, 425. Sedg. Damages, (8th ed.) §§ 737, 788.

The only difficulty in the way of the proposed measure of damages which impresses us is, that, when the defendants made their contract, it was not certain in a commercial sense that the plaintiff could sell what he ordered. His bicycle seems to have been more or less of an experiment. But as remoteness, that is to say, whether under given circumstances upon an ascertained contract, certain damages are within the scope of the risk undertaken, is always a question of law; (*Hobbs v. London & South*

western Railway, L. R. 10 Q. B. 111, 122, and *Hammond v. Bussey*, 20 Q. B. D. 79, 89;) and as the auditor found the amount of the plaintiff's damages, if they were not too remote, we are compelled to say that, as between the plaintiff's claim and nominal damages, the former comes nearer to doing justice than the latter, in view of the considerations which we have mentioned. The defendants by their contract took the risk of damages to that extent, if it should turn out that the plaintiff could sell as it was contemplated and expected that he would. Sedg. Damages, (8th ed.) §§ 197, 198. *Hammond v. Bussey*, 20 Q. B. D. 79, 86, 94, 100.

It will be understood that the contracts made by the plaintiff are not recovered for as such. But the orders, covering as they did more than the number of bicycles to be built by the defendants, coupled with the above mentioned agreement as to the retail price, are evidence of the value of the wheels. *France v. Gaudet*, L. R. 6 Q. B. 199, 204. If, as we understand, the orders were contracts, conditional only upon being performed in time, it does not matter whether they were good or bad under the statute of frauds. They are equally instructive as to value either way, if they were mercantile agreements intended to be carried out.

Exceptions sustained.

JOHN LESLIE vs. GRANITE RAILROAD COMPANY.

Norfolk. November 11, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Master and Servant — Negligence — Evidence — Expert.

At the trial of an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff, who was employed in a quarry, by the giving way of the guys of a derrick near which he was working, it appeared that the defendant's superintendent directed a chain to be placed around a large stone and fastened by a slip link at the back of the top edge of the stone in order to turn it, the end of the chain being attached to the boom of the derrick; and that, when the derrick was started, the stone moved and canted on its edge and then lurched over, bringing a strain on the derrick, and the guys then gave way. Several experts were called by the plaintiff and asked, against the defendant's objection, a hypothetical question as to the usual method of turning

such a stone, describing its size and situation as shown by the evidence, by such a derrick, describing it. The witnesses described a different method from that used, and testified in effect that the method pursued caused the result; and these were contradicted by experts for the defendant. *Held*, that the evidence objected to was competent; and that there was evidence of negligence in handling the stone which caused the guy to give way.

In an action for personal injuries occasioned to the plaintiff, while employed in a quarry, by the giving way of a guy of a derrick, the end of which was fastened to the derrick after passing through a ring by a patent clip made of cast iron, a witness, who was an expert in iron and steel, testified that there was a difference in the strength of cast iron and wrought iron. He was then asked, against the defendant's objection, which was the stronger of the two, and answered, "wrought iron." At this time there was no evidence in regard to these clips except that they were used to fasten the guys; but subsequently the defendant put in evidence that this clip was the best kind obtainable. *Held*, that the evidence objected to was competent at the time it was introduced.

The proper way of turning a large stone in a quarry so as not to bring an undue strain upon the derrick used in the work may not be matter of common knowledge, but a subject for expert testimony.

An expert witness called by the plaintiff in an action for personal injuries alleged to have been caused by the negligent manner of moving a stone in a quarry, who has testified, on cross-examination, without objection by the defendant, that the method adopted would be improper, may be allowed, on re-direct examination, to state the reason of his opinion.

TORT, for personal injuries sustained by the plaintiff on September 22, 1896, while in the employ of the defendant at its quarry in Quincy. The declaration contained several counts. The fourth count, on which alone the jury found for the plaintiff, was under the employers' liability act, the St. of 1887, c. 270, § 1, cls. 1, 2, and alleged, among other things, that the injuries were caused by the negligent manner of moving a stone in the quarry. Answer, a general denial. At the trial in the Superior Court, before *Bond, J.*, the defendant alleged exceptions, which appear in the opinion.

J. Lowell & J. A. Lowell, for the defendant.

J. E. Cotter, (J. W. McAnarney with him,) for the plaintiff.

LATHROP, J. The exceptions in this case relate to the refusal of the judge, at the close of all the evidence, to instruct the jury to return a verdict for the defendant, and to the admission of certain evidence offered by the plaintiff. No requests for instructions were made, and no exception was taken to any part of the charge. There was evidence from which the jury would have been warranted in finding the following facts. The plaintiff had been set to work, with five other workmen, cutting a

large stone that was on the surface of the ground near the top of the defendant's quarry, and near a large derrick. At the same time other men were at work on another stone, eighteen feet long by eight feet high, and two and a half feet thick. This stone weighed about thirty tons. It stood on its edge, and it was necessary to turn it so as to work on its top. One Robertson, who was the defendant's superintendent and the foreman of its quarry, and who had charge of the men, called a number of quarrymen from the quarry to operate the derrick and turn the stone. He directed the men how to put a chain about the stone, and where to fasten it, which was back of the top edge of the stone, with a slip link. The end of the chain was then attached to the boom of the derrick. The derrick was started, the stone moved and canted on its edge, and then lurched over. This brought a strain on the derrick, and one guy gave way and then another. The plaintiff was struck by one of the guys and injured.

Several experts were called by the plaintiff, and were asked a hypothetical question as to the usual method of turning such a stone, describing its size and situation as shown by the evidence, by such a derrick, and describing the derrick. To this question the defendant objected. The witnesses described a different method from that used by Robertson, which would avoid the jerk. One of the witnesses testified, in effect, that the method pursued in this case caused the stone to lurch, and that when the lurch came it was impossible not to have the strain; and that either the guy would give way, or the chain would break. While the experts for the defendant contradicted the experts for the plaintiff, it is clear that there was evidence for the jury that there was negligence in the handling of the stone, which caused the guy to give way.

It appeared that the end of the guy which gave way was fastened to the guy, after passing through a ring, by a patent clip called the Crosby clip, made of cast iron. One witness for the plaintiff, who was an expert in iron and steel, testified that there was a difference in the strength of cast iron and wrought iron. The plaintiff's counsel then asked the witness which was the stronger of the two, wrought iron or cast iron. This question was excepted to. The witness answered, "Wrought

iron." At the time this question was allowed to be put there was no evidence in the case in regard to these clips, except that they were used to fasten the guys, as before stated. Robertson subsequently testified, for the defendant, "that the patent clips such as were used on the guys of this derrick, and one of which broke, were the best that could be bought, and that this was the first of these clips that he ever knew to break." One other witness testified for the defendant that "the Crosby clip was the best kind of clip obtainable." There was also evidence that the derrick was regularly inspected.

On this evidence, the defendant contends that, as it bought the best clip known, the breaking of it was not evidence of negligence; and that the case came within the rule stated in *Reynolds v. Merchants' Woolen Co.* 168 Mass. 501. In this case it is said: "Machinery used in textile manufacturing is ordinarily built and furnished by persons whose business it is to make machinery, and who, if reputable makers, are more likely to turn out safe products than men whose chief skill and thought are developed in some other line of work. Mill owners usually procure their machines of reputable makers. Such conduct meets the standard of ordinary care, and it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use machinery so bought."

If we assume that the clip came within this rule, the defendant should have asked for instructions based upon the supposition that the jury believed the defendant's witnesses. But this does not affect the competency of the evidence at the time it was introduced. There was at that time nothing to show that such a clip was made only of cast iron, and indeed this fact appears only inferentially from the evidence for the defendant. The evidence tended to show that the clip could have been made of a stronger material than was used, and had a bearing upon the question of reasonable care.

The defendant further contends that the testimony of the experts should have been excluded, on the ground that it was a matter within the common knowledge of the jurymen. The question was as to the proper way of turning a stone so as not to bring an undue strain upon the derrick. It can hardly be said that this is a matter of common knowledge, when the de-

fendant's experts differed so widely from those of the plaintiff on this subject.

The only other objection relates to a question put to one Cook. This witness, who was called as an expert by the plaintiff, testified on cross-examination that it would be an improper way to chain the stone by putting the chain entirely around it. On redirect examination, the plaintiff's counsel asked the witness his reasons why he stated it would be improper to place the chain entirely around the stone in turning it. This question was objected to. The witness was allowed to answer, and the defendant excepted to the question.

We see no ground for this exception. An expert may state the grounds and reasons of his opinion. *Hawkins v. Fall River*, 119 Mass. 94. *Eidt v. Cutter*, 127 Mass. 522. *Commonwealth v. Leach*, 156 Mass. 99, 102.

The defendant, however, objects that the question should not have been allowed because it called for an opinion on the issue, which was for the jury to decide. But the witness had been allowed, on cross-examination, to make the answer he made, and we are of opinion that it was within the discretion of the judge to allow him to state the reasons for his opinion.

Exceptions overruled.

CHARLES J. HAYDEN & another, trustees, *vs.* FANNIE E.
BARRETT & others.

Suffolk. December 5, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, MORTON, BARKER, & HAMMOND, JJ.

Will — "Heir by Blood" — Illegitimate Child.

Where a testator plainly intended by the use of the term "heirs by blood" to indicate those persons whose relationship was by some tie of consanguinity, and to exclude all others, such as husband, wife, or adopted children, an illegitimate son must be regarded within the meaning of the will as the "heir by blood" of his mother.

BILL IN EQUITY, for instructions as to the construction of the following portion of the will of Sidney B. Morse :

"Tenth. I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real, personal, and mixed, . . . to . . . trustees . . . to pay the net income, rents, and profits thereof to my beloved wife Mary Ann Morse during her life, . . . and upon her decease to continue to hold . . . the same during the term of ten years from said time. . . .

"5. To pay three tenths of the income thereof to the children of my brother George H. Morse, viz.: Mary Ann Morse, Fannie E. Barrett, wife of Frank S. Barrett, and Roswell M. Morse, to be equally divided among them, the portion payable to females to be so paid upon their sole receipt and free from the control or interference of any husbands they may have, or in case one or more of them decease prior to the expiration of said ten years to pay the income due to such one or more to his or her or their respective heirs by blood, and at the expiration of said ten years, to transfer, pay over, and convey one of said ten parts so divided as hereinbefore provided to the said Mary Ann Morse, one of said ten parts to the said Fannie E. Barrett, and one of said ten parts to the said Roswell M. Morse; or in case one or more of them are not then living to transfer, pay over, and convey such part or portion to his or her or their respective heirs by blood."

Mary A. Morse, the widow of the testator, died on or about July 11, 1895, and Mary Ann Morse, the niece of the testator, died on or about November 25, 1895.

It was agreed "that the respondent Fannie E. Barrett is the sister, and the respondent Horace E. Morse is the son, of a pre-deceased brother of the Mary A. Morse last mentioned in the petition; that the respondent Ernest L. Morse is the illegitimate child, born November 24, 1895, of said Mary A. Morse; that said Mary Ann Morse never married, and that she left no father or mother, and no issue, brother or sister, or descendant of any deceased brother or sister, other than the respondents."

The bill alleged that a certain portion of the income now in the hands of the trustees "is by the terms of said clause 5 now payable, and a like portion of the income to accrue during the period of ten years from the death of the testator's widow, and also of the principal of said trust fund at the expiration of said ten years will be payable to the heirs by blood of the said last named Mary A. Morse, deceased."

Holmes, J. was of the opinion that the respondent Ernest L. Morse was entitled to the portion of the fund in controversy; but, at the request of the other respondents, reported the case for the consideration of the full court.

C. P. Lincoln, for the petitioners, read the papers in the case.

W. Sullivan, for the respondent Ernest L. Morse.

E. G. McInnes, (*C. A. Whittemore* with him,) for the other respondents.

HAMMOND, J. The single question is whether under the fifth clause of the tenth item of this will the illegitimate son of Mary Ann Morse takes as her "heir by blood."

By the common law of England and of this Commonwealth a bastard in all matters relating to the inheritance of property was nobody's child, and as to such matters his existence was therefore ignored. *Cooley v. Dewey*, 4 Pick. 93. 2 Dane, Abr. 522, and cases therein cited. *Pratt v. Atwood*, 108 Mass. 40.

And accordingly it is also well settled that, in the absence of any language clearly expressing the contrary, all general words in the statutes of distribution, such as "child," "children," "next of kin," and similar words descriptive of classes who are to inherit, do not include illegitimate children. *Kent v. Barker*, 2 Gray, 535, and cases therein cited. And so of similar expressions in a Massachusetts will. *Kent v. Barker, ubi supra*. *Adams v. Adams*, 154 Mass. 290. *Haraden v. Larrabee*, 113 Mass. 430.

If, therefore, the rights of the illegitimate son of Mary Ann Morse depended upon the common law, the decision must be against him. But for two generations and more it has been the statute law of this Commonwealth that an illegitimate child shall be the heir of his mother, and the tendency of legislation as shown by an amendment to the statute seems to be growing in the direction of change in the common law in this respect more favorable to him. By our statutes Ernest L. Morse was the heir of his mother, and of any maternal ancestor, and, if the mother died intestate, he, being the only child, was her sole heir as to all her property. See Pub. Sts. c. 125, § 3.

By the will the property at her death goes to the "heirs by blood." The illegitimate son, it is true, does not take it by descent from his mother, but, if at all, as the person designated by the will.

In *Lavery v. Egan*, 143 Mass. 389, 392, where real estate had been devised to a person for life, with contingent remainder to her heirs, it was decided that the husband of the life tenant took as her heir under St. 1880, c. 211, § 1, which provides that in certain cases a husband shall take in fee the real estate of his deceased wife to an amount not exceeding five thousand dollars in value. In giving the opinion Mr. Justice Field says: "Although in the case at bar the heirs of . . . [the life tenant] do not take from her by inheritance, but take as persons designated by the will, yet we know of no way of determining the persons intended by the will, except by ascertaining the persons who by law would have inherited the estate from her if she had died seised of it and intestate."

Applying that principle to this case, we have no doubt that, within the meaning of the will as interpreted in the light of the statute, the illegitimate child was the heir of his mother, and it only remains to be considered whether he was her heir "by blood" within the meaning of the will.

The expression "heirs by blood" occurs several times in the will. In the first clause of this tenth item the trustees are directed to pay certain income "to my niece Helen E. Howland, daughter of my said sister Caroline Ware Morris, upon her sole receipt and free from the control or interference of any husband she may have, and in case of her death prior to the expiration of said ten years to pay said balance if any to her heirs by blood." And the second clause of said item is as follows: "To pay one tenth of the income thereof to my niece Caroline E. Dutton upon her sole receipt free from the control or interference of any husband she may have, and in case of her death prior to the expiration of said ten years then to pay the said income to her heirs by blood, and at the expiration of said ten years to transfer, pay over, and convey one of said ten parts so divided as hereinbefore provided to the said Caroline E. Dutton, or in case she is not then living to her heirs by blood."

And the same language is used with reference to the legacies to the other nieces and to his nephew, in the same item of the will. All the way through this item the testator was bearing constantly in mind the husbands of these various nieces, and he desired that there should be no control or interference on the

part of any such husband during the life of the niece, and then in the same general line of thought uses language which finally excludes the husband from having any share in the property after the decease of the niece.

It is plain, we think, that the testator intended by the use of the term "heirs by blood" to indicate those persons whose relationship was by some tie of consanguinity, and to exclude all others, such as husband, wife, or adopted children. He intended to keep the property in the family and within the tie of consanguinity, but otherwise was content that the law should determine who should be the heir to any niece.

Within the meaning of the will, Ernest L. Morse was the "heir by blood" of his mother. *Decree accordingly.*

KATHERINE F. COOLEY vs. GEORGE H. COOLEY & another.

Suffolk. December 8, 1898. — January 9, 1899.

Present: FIELD, C. J., HOLMES, MORTON, BARKER, & HAMMOND, JJ.

Deed taken in Names of Minor Children — Resulting Trust.

Where, on a bill in equity for a conveyance, it appears that the plaintiff, who was a widow, did not intend, when the deed was taken in the name of her children, to make a gift or advancement to them, but intended that the beneficiary interest should be exclusively hers, she having paid the purchase money, and was very much surprised when told that the effect of what she had done might be to the contrary, the deed must be regarded as not intended as a gift or advancement, and there is a resulting trust in her favor.

BILL IN EQUITY, filed March 7, 1898, against George Henry Cooley and Lulu Josephine Cooley, minor children of the plaintiff, to establish a resulting trust in land in favor of the plaintiff.

Trial in the Superior Court, before *Braley, J.*, who reported the case for the consideration of this court, in substance as follows.

The plaintiff, who was a widow, on January 17, 1898, purchased a lot of land, with a house thereon, situated in Boston,

for five thousand dollars, the bill alleging that "your complainant, being ignorant of the law, by a mistake, and believing that the property purchased by her would be within her own control and management, and that she could dispose of the same by deed or mortgage in the same way as if it had been conveyed to her in her own name, had the deed to said real estate made in the name of her said children." The evidence tended to show that the plaintiff, at the time the deed was taken in the name of her children, did not intend to make a gift or advancement to them, but intended that the beneficiary interest should be exclusively hers, and that she was very much surprised when she was told that the effect of what she had done might be to the contrary.

Such decree was to be entered as law and justice might require.

L. C. Southard, for the plaintiff.

J. F. Kilton, for the defendants.

HAMMOND, J. The general rule is, that, where upon a purchase of property the conveyance is taken in the name of one person while the purchase money is paid by another, the parties being strangers to each other, a resulting trust immediately is presumed in favor of the party paying the money. *Perry on Trusts*, § 126, and cases cited.

But in some cases where the parties are not strangers to each other, as in the case of a purchase by the husband in the name of his wife, or a father in the name of his child, the presumption is that there is no resulting trust, but that the transaction is in the nature of a gift or advancement. *Perry on Trusts*, § 143, and cases cited.

The authorities are somewhat in conflict as to whether, in the case of a purchase by a widow in the name of her minor child, the presumption is in favor of a resulting trust in favor of the mother, or a gift or advancement to the child. *Bennett v. Bennett*, 10 Ch. D. 474, 478. *Sayre v. Hughes*, L. R. 5 Eq. 376. *Lewin on Trusts*, (9th ed.) 187. *Batstone v. Salter*, L. R. 10 Ch. 431. *Murphy v. Nathans*, 46 Penn. St. 508.

But whatever may be the presumption it is liable to be rebutted by evidence.

We have examined the evidence in this case, and are of the

opinion that the plaintiff at the time the deed was taken in the name of her children did not intend to make a gift or advancement to them, but intended that the beneficiary interest should be exclusively hers, and that she was very much surprised when she was told that the effect of what she had done might be to the contrary. The deed was not intended as a gift or advancement, and there is a resulting trust in favor of the plaintiff.

Decree for the plaintiff.

ALBERT TUSON vs. JAMES M. CROSBY & others.

Worcester. October 6, 1898. — January 12, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Indemnity Bond — Evidence — Instructions — Exceptions.

In an action upon a bond conditioned to indemnify the plaintiff for all loss sustained by reason of his becoming bail for A., who had been arrested upon a criminal charge, B., an attorney who had procured the plaintiff to bail A. and the bond in suit to be made, testified, on cross-examination, that he was retained by A. as his attorney. The plaintiff then asked how much his retainer was. The question was excluded, and the plaintiff then stated that he proposed to show that B. received a large sum of money from A. to indemnify the sureties, but the question was again excluded. The plaintiff then asked B. how much money he received from A. The judge excluded this question, but offered to allow the plaintiff to ask B. how much, if anything, he received to indemnify the plaintiff or the sureties on the bond. B. denied that he received any money from A. to indemnify the sureties. The plaintiff then asked B. if A. did not let him have a certain sum, stating that he desired to show that B. received a large sum of money from A., and to submit to the jury the question whether it was not received for some purpose other than that of services as counsel; but the judge excluded the evidence. *Held*, that these questions were properly excluded, in the discretion of the judge.

It cannot be contended that a bond conditioned to indemnify the plaintiff for all loss sustained by reason of his becoming bail for the principal obligor cannot be affected by subsequent parol agreements of the parties, but must be considered to remain in force until released by an instrument of equal dignity and solemnity. The point, that there was a variance between the proof of the defence and the allegations of the answer in an action, if not raised at the trial, is not open on a bill of exceptions.

CONTRACT, upon a bond executed on June 8, 1895, by Perry Yarrington as principal, and by the defendants and others as

sureties, and conditioned to indemnify the plaintiff for all loss sustained by reason of his becoming bail for Yarrington, who had been arrested upon a requisition from the Governor of the Commonwealth on an indictment against him in the county of Worcester.* The joint answer of the defendants alleged, in substance, that after the execution of the bond the plaintiff agreed orally with the defendants that, if they would procure Yarrington to be surrendered to the plaintiff in this Commonwealth, in consideration thereof the plaintiff would thereupon discharge all the sureties from liability on the bond, and thereby the condition of the bond should be fully satisfied, and he would waive any further performance of such condition; that the sureties delivered Yarrington to the plaintiff and fully performed their agreement; and that the defendants were entitled in equity to be absolutely relieved against the plaintiff's cause of action by reason of such agreement and its performance, and, further, that the plaintiff agreed with the defendants to surrender Yarrington to the authorities of the county of Worcester, and the defendants requested the plaintiff to so surrender Yarrington, but the plaintiff let him go at large.

Trial in the Superior Court, before *Bond, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered evidence tending to show that the defendants, with the other obligors on the bond, executed the same; that the plaintiff recognized for the appearance of Yarrington, as recited in the bond; and that in August, 1895, Yarrington made default on the recognizance, and a suit was commenced by the Commonwealth against the plaintiff on his recognizance, and he paid the sum of \$2,100 in settlement of that case.

The defendants called as a witness one John M. Brennan, who testified, in substance, that Yarrington was arrested in Providence, Rhode Island, just before the time of making the bond in suit, on a requisition from the Governor of Massachusetts, and was brought from Providence to Worcester and lodged in jail, on an indictment in the Superior Court; that the witness was retained as counsel for Yarrington in the matter of the indictment and requisition, and procured the plaintiff to bail him out, and further procured the bond in suit to be made, the sureties being friends and clients of the witness; that all the sureties

signed the bond at his request; that no indemnity or inducement was offered to the sureties for signing the bond; that a consideration of one hundred dollars was to be paid to the plaintiff for going bail for Yarrington; that, some time after the bond was signed and Yarrington was at large upon bail, the latter was arrested again in Providence upon a complaint that he was a fugitive from justice from the State of New York, and was in jail in Cranston, Rhode Island; that thereupon Brennan, acting for all the parties, sent for the plaintiff and made an oral agreement with him that Brennan would procure Yarrington to be bailed in Providence upon the complaint, provided the plaintiff would give a power of attorney to a person in Rhode Island authorizing him to take Yarrington upon the Massachusetts bail bond and bring him here; that thereupon the attorney should bring him to Massachusetts and surrender him upon his bail bond to the authorities here, or surrender him to the plaintiff, and that Brennan would pay the expenses of taking Yarrington to Massachusetts, and the plaintiff should, in consideration thereof, discharge the sureties and surrender the bond; that the plaintiff furnished the power of attorney, and Yarrington was sent to Massachusetts; and that Brennan procured the bail as agreed. The defendants offered evidence tending to show that the attorney under the power of attorney, one Winslow, brought Yarrington to Massachusetts and surrendered him to the plaintiff.

The defendants also offered other evidence corroborative of the testimony of Brennan, with reference to the oral agreement with the plaintiff as to the surrender of Yarrington, and as to the agreement to discharge the sureties on the bond.

The plaintiff contradicted this evidence of the defendants, and offered evidence tending to show that he furnished the power of attorney at the request of Brennan for a different purpose from that testified to by Brennan, namely, that the sureties on the bond might be protected by having Yarrington in Massachusetts, where the plaintiff could, if he saw fit, take him upon his bail bond, and prevent his being taken to New York by means of requisition papers from that State; and he denied the contract testified to by Brennan and other witnesses for the defendants, and denied also that he ever agreed to receive

Yarrington or to surrender him, and that Yarrington was ever surrendered to him in any manner or form.

On cross-examination, Brennan testified that he was retained by Yarrington as his attorney. The plaintiff's counsel asked him how much his retainer was. Upon objection being made, the judge excluded the evidence. The plaintiff then stated that he proposed to show that Brennan received a large sum of money from Yarrington to indemnify the sureties, but the judge excluded the question; and the plaintiff excepted.

The plaintiff then asked Brennan how much money he received from Yarrington. The judge excluded the evidence, saying that he would admit the question as to how much he received, if any, to indemnify him or the sureties on the bond; and the plaintiff excepted. Brennan denied that he received any money from Yarrington to indemnify the sureties on the bond. The plaintiff then asked the witness if Yarrington did not let him have \$1,200 or more, stating that he desired to show that the witness received a large sum of money from Yarrington, and submit to the jury the question whether it was not received for some purpose other than that of services as counsel. The judge excluded the evidence, and the plaintiff excepted.

At the close of the evidence, the plaintiff asked the judge to rule as follows:

"1. The instrument sued on in this case, being a written instrument under seal, cannot be released or waived by a mere verbal agreement, and no verbal agreement of the plaintiff to release the bond can have any effect to discharge the defendants from liability.

"2. If the defendants executed the bond in suit and delivered it to the plaintiff, and thereafter Yarrington made default in the criminal court of Worcester and failed to indemnify and save harmless the plaintiff according to the condition of the bond, the defendants are liable, notwithstanding the fact that Yarrington was taken by an attorney of the plaintiff and brought from Rhode Island to this State, and notwithstanding the fact that the plaintiff failed to surrender him.

"3. If the defendants executed and delivered the bond, and Yarrington made default thereon and failed to indemnify the plaintiff according to the condition of the bond, the defendants

are liable in this action, even though the plaintiff verbally agreed with Brennan, or with either of the defendants, that he would surrender the body of Yarrington to the authorities at Worcester.

“4. If the defendants executed and delivered the bond in suit, and Yarrington voluntarily defaulted upon his recognizance in Worcester, the facts set out in the joint answer of the defendants do not constitute any defence to this action.”

The judge declined to give these rulings, but instructed the jury as follows:

“If the plaintiff agreed substantially with the sureties on the indemnity bond, or the other agents, the people who represented them, if they would procure the release of Yarrington from custody in Rhode Island, and by means of a power of attorney to be given by the plaintiff to some one in Rhode Island, who should at the expense of the sureties on the indemnity bond bring Yarrington from Rhode Island to Massachusetts and there deliver Yarrington to the plaintiff to be delivered up to the authorities by the plaintiff or to be delivered under the power of attorney to the authorities in Worcester County, and that then the plaintiff should surrender to them the indemnity bond, and if the defendants performed their part of that arrangement and did deliver Yarrington to the plaintiff in Massachusetts, and the plaintiff took the control and custody of Yarrington and prevented Winslow from taking Yarrington to Worcester, or accepting Yarrington from Winslow in pursuance of the agreement he had made with the defendants, and then the plaintiff made some arrangements with Yarrington whereby Yarrington was to remain in Boston, and by reason of such an arrangement made by the plaintiff with Yarrington, Yarrington was enabled to depart so he did not appear when he was called in Worcester, then the plaintiff is not entitled to recover. In other words, if the arrangement was made, and was fully performed on the part of the defendants, and the plaintiff took the responsibility, in this Commonwealth, of what should be done with Yarrington, and allowed him to depart for any reason, whether it was by virtue of some agreement that he had made with him, — if any consideration whatever, it is not material, but if he allowed him to go instead of surrendering him under the arrangement that

was made, then it is his fault that there was a loss on his part, and he would not be entitled to recover here."

The plaintiff excepted to the refusal to give the rulings requested, and to the instructions given.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

F. P. Goulding, (*W. C. Mellish* with him,) for the plaintiff.

J. W. Corcoran, (*C. F. Aldrich* with him,) for the defendants.

BARKER, J. The plaintiff contends that it was error to exclude certain questions which he put to the witness Brennan upon his cross-examination. Brennan was a counsellor at law who was retained for Yarrington in the matter of the Massachusetts indictment and requisition, and who had procured the bond in suit to be made to the present plaintiff and had procured the plaintiff to bail Yarrington. In cross-examination Brennan testified that he was retained by Yarrington as his attorney. The plaintiff then asked how much his retainer was. The question was excluded, and the plaintiff then stated that he proposed to show that Brennan received a large sum of money from Yarrington to indemnify the sureties, but the court again refused to allow the question as to how much his retainer was to be put to Brennan. The plaintiff then asked Brennan how much money he received from Yarrington. The court excluded the question, but offered to allow the plaintiff to ask the witness how much, if anything, he received to indemnify the plaintiff or the sureties on the bond. Brennan then denied that he received any money from Yarrington to indemnify the sureties on the bond. The plaintiff then asked if Yarrington did not let him have \$1,200 or more; and in connection with this question the plaintiff stated that he desired to show that the witness received a large sum of money from Yarrington, and to submit to the jury the question whether it was not received for some purpose other than that of services as counsel.

We think the plaintiff's exceptions to these rulings should be overruled. The question how much Brennan received from Yarrington as a retainer was immaterial to the issues upon trial. Brennan testified that he received no money from Yarrington to indemnify the sureties on the bond. This covered the issue to which this part of the examination was directed. The further

question, whether Yarrington did not let him have \$1,200 or more, without an offer to show from this witness or any other witness for what purpose the money was paid, if paid at all, is not shown to have related to any issue upon trial, and could be properly excluded in cross-examination, in the discretion of the presiding justice.

The contention that the bond in suit could not be affected by subsequent parol agreements of the parties, but must be considered to remain in force until released by an instrument of equal dignity and solemnity, is not law. *Munroe v. Perkins*, 9 Pick. 298. *Mill Dam Foundery v. Hovey*, 21 Pick. 417. *Blasdell v. Souther*, 6 Gray, 149, 151. *Hastings v. Lovejoy*, 140 Mass. 261, 264, 265. The rulings requested and refused, which all rested upon this erroneous theory of the law, were therefore rightly refused. If, as the plaintiff now contends, there was a variance between the proof of the defence and the allegations of the answer, that question does not appear to have been raised at the trial, and cannot avail the plaintiff here. Aside from any questions which might be open if the plaintiff had contended at the trial that there was a variance, we see no ground for criticising the charge.

Exceptions overruled.

JAMES F. AUSTIN vs. FITCHBURG RAILROAD COMPANY.

Suffolk. November 8, 1898. — January 13, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Railroad — Due Care — Assumption of Risk — Law and Fact — Negligence.

If a brakeman in the employ of a railroad corporation is ordered to couple to a train a flat car loaded with stones which lay on the floor of the car unsecured with cleats, stakes, or blocking, as was customary, and while so coupling it is injured by having his arm caught by one of the stones which was forced over the edge of the car by the concussion caused by the cars coming together, in an action for his injury it cannot be held, as matter of law, that he was negligent in failing to observe that the stones were unsecured, or that the risk was so obvious that he assumed it, but these questions are for the jury, who will be warranted in finding that he was in the exercise of due care.

Where a railroad corporation has in its possession for nearly a week a flat car, origi-

nally loaded with stones by it, and then orders the car to be coupled to a freight train for transportation to a point farther along upon its road, if the stones are not secured with cleats, stakes, or blocking, as was customary, and a brakeman in its employ while coupling the car is injured by having his arm caught by one of the stones which was forced over the edge of the car by the concussion caused by the cars coming together, in an action for the injury, the jury are warranted in finding that the corporation was negligent in furnishing for transportation a car loaded in a dangerous manner.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ as a brakeman. The declaration contained two counts, one under the employers' liability act, St. 1887, c. 270, and the other at common law. Trial in the Superior Court, before *Sherman, J.*, who ruled that the plaintiff could not recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. It was agreed that, if the ruling and direction were right, judgment was to be entered for the defendant; if wrong, and the exceptions were sustained, judgment was to be entered for the plaintiff in the sum of \$4,000. The facts appear in the opinion.

F. S. Hesseltine, for the plaintiff.

G. A. Torrey, for the defendant.

MORTON, J. There are two counts in the declaration, — the first under the employers' liability act, and the second at common law. The first count alleges that, while he was in the exercise of due care, the plaintiff "was severely injured by a large stone improperly placed on a freight car and in a dangerous condition by reason of the negligence of said corporation or of some person in the service of said corporation intrusted with and exercising superintendence, whose sole and principal duty was that of superintendence." The second count alleges that the plaintiff, being in the exercise of due care, was injured "by reason of the negligence of said defendant corporation in providing an improper, unsafe, and dangerous car for the transportation of stone, and by improperly loading said car."

We think that there was evidence which would have warranted the jury in finding that the plaintiff was in the exercise of due care. He was ordered by the conductor to couple the car to a train about to leave East Deerfield for Athol. The car was a flat car loaded with stone. The stone lay on the floor of the car, unsecured with cleats, stakes, or blocking, as was customary.

The plaintiff got down from a box car and went forward, took the link with his right hand and held it ready to put in the pin. He did not notice how the stones were loaded, or whether they were secured. The concussion caused by the cars coming together forced one of the stones over the edge of the car, and it caught and crushed the plaintiff's arm. Evidently the plaintiff's attention was directed to making the coupling, and it cannot be held, as matter of law, that he was negligent in failing to observe that the stones were unsecured. Whether he should have done so under the circumstances was a question for the jury. *Snow v. Housatonic Railroad*, 8 Allen, 441. *Hannah v. Connecticut River Railroad*, 154 Mass. 529. *Steffe v. Old Colony Railroad*, 156 Mass. 262.

What he would have done if he had noticed the want of cleats or stakes was of no consequence. The question was whether, in the exercise of due care, he ought to have noticed that there were none. Neither do we think that the risk was so obvious or so incidental to his employment that he must be held, as matter of law, to have assumed it. There was evidence, as already observed, that it was customary to secure such stones with stakes and cleats or blocking. The rules of the road also required them to be secured. If the plaintiff had not a right to assume that the stones were properly secured, it was at least a question for the jury whether the chances that they might not be secured were so obvious as to constitute one of the risks which he assumed.

We think also that there was evidence on which the jury properly could have found that the defendant was negligent in furnishing for transportation a car that was loaded in a dangerous and insecure manner. There was evidence that the car was loaded at Fitchburg by the defendant corporation. It does not distinctly appear whether it was in the same condition when received at East Deerfield and when it was coupled to the train for Athol in which it was when loaded at Fitchburg and when it arrived at East Deerfield. But there was evidence tending to show that it arrived at East Deerfield on May 1, and remained there till May 7, when it was coupled to the train for Athol. If the stones had been properly secured, and the cleats or blocking had been removed shortly before the coupling preparatory to unloading the car a short distance away, it was within the

defendant's power to produce evidence of those facts. It did not do so. The car was in its possession, had been loaded by it, was being coupled, as the jury might have found, at the time of the plaintiff's injury, to a freight train of the defendant for transportation to a point farther along upon its road, and the stones were then in unsecure positions upon the car. We think that it would have been competent for the jury to find that the car had been some days at least in an unsafe condition for transportation, and that the defendant knew or ought to have known of its condition, and was negligent by reason of furnishing a car which, on account of being improperly loaded, was unsafe for the plaintiff to work upon. It does not appear whether materials for securing the stones were furnished by the defendant corporation. Inasmuch as the car was loaded by it, and the stones were being transported by it to build a bridge which it was building at Turner's Falls Junction, the jury would have been warranted in finding, if that was material, that it was its duty to furnish suitable material for securing the stones.

It is not necessary to consider whether there was negligence on the part of some person intrusted with and exercising superintendence. See *Donahoe v. Old Colony Railroad*, 153 Mass. 356; *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532; *Fairman v. Boston & Albany Railroad*, 169 Mass. 170.

The result is, that the exceptions must be sustained, and, according to the agreement, judgment is to be entered for the plaintiff for four thousand dollars.

So ordered.

MARGARET C. SPADE vs. LYNN AND BOSTON RAILROAD
COMPANY.

Suffolk. November 8, 1898. — January 16, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Street Railway — Action — Damages.

If a passenger upon a street car suffers physical injury from fright caused by the removal of a drunken man, and by a slight unintentional battery of her person, she can recover only for the fright caused by the battery, not for that which was due to her general disturbance.

It seems that an unavoidable battery of a passenger's person in the process of lawfully removing a drunken man from a street car is not actionable.

A street railway company's obligations to a passenger are not increased by notice that he has unstable nerves.

A trespasser is liable for all the consequences of an unlawful battery of the person, although the consequences are enhanced by abnormal weakness.

TORT, for personal injuries sustained by the plaintiff, while a passenger on the defendant's car, through the alleged negligence of the defendant. After the former decision, the case was tried in the Superior Court, before *Dewey, J.*

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

C. K. Cobb, for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

HOLMES, J. This is an action for personal injuries which already has been before the court. 168 Mass. 285. At the second trial the evidence was that the defendant's conductor in removing a drunken man from a car jostled another drunken man who was standing in front of the plaintiff, and threw him upon her. The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man

off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders. *Gilbert v. Stone*, Aleyn, 35; *S. C. Style*, 72. *Scott v. Shepherd*, 2 W. Bl. 892, 896. Cooley, Torts, 115. See *McLeod v. Jones*, 105 Mass. 403, 405; *Miller v. Horton*, 152 Mass. 540, 547; *Pierce v. Cunard Steamship Co.* 153 Mass. 87, 90; *Whalley v. Lancashire & Yorkshire Railway*, 13 Q. B. D. 131. And compare the rule as to duress in contracts and conveyances. *Fairbanks v. Snow*, 145 Mass. 153, 155. On the other hand, the contrary has been intimated in a case of shooting in self-defence, the injury to the third person being treated on the footing of accident. *Morris v. Platt*, 32 Conn. 75, 84. See Bacon's Maxims, Reg. V. & VI.; Add. Torts, (6th ed.) 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way. See *Taylor v. Plymouth*, 8 Met. 462, 465; *American Print Works v. Lawrence*, 3 Zab. 590, 613. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy. *The King v. Sewer Commissioners*, 8 B. & C. 355. *Nield v. London & Northwestern*

Railway, L. R. 10 Ex. 4. Compare *Whalley v. Lancashire & Yorkshire Railway*, 13 Q. B. D. 131. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles; but if that care is shown, probably the injury must be regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunken man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person, and not for such mental disturbance and injury as were caused by other acts of the conductor and the general disturbance in the car. This was refused, and the jury were instructed that, if there was a physical injury and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became or might be found liable for all the consequences of the disturbance in the car and of the plaintiff's fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery, and it is for the consequences of the battery only

that the defendant is liable, not for all the consequences of the drunken man's presence in the car or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due in substance to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter finding.

We may add a word with reference to a suggestion made on behalf of the plaintiff, and having some bearing upon the eighth instruction asked and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person and that the conductor must have known it. We regard such an argument even to the jury as wholly inadmissible. Ordinary street cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it was left to the jury to say whether there was anything that called for special attention to the plaintiff beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation except the conductor's acquaintance with the plaintiff, and that laid no foundation for it. We should add, however, to avoid being misunderstood and with reference to the plaintiff's tenth request, that if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person. *Braithwaite v. Hall*, 168 Mass. 38, 40. The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.

Exceptions sustained.

THOMAS J. KING vs. ROBERT E. DALY & others.

Suffolk. January 24, 1899. — January 25, 1899.

Present: HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Equity — Injunction — Decree — Finding.

When the evidence is not before the court, and it does not appear as matter of law from the facts set forth in the decree that more relief ought to have been granted, this court cannot revise the finding of the single judge.

BILL IN EQUITY, filed September 26, 1898, in the Superior Court, against Robert E. Daly, Joseph Daly, and John F. Daly, alleging the following facts.

The defendant Robert E. Daly was, on August 27, 1898, the owner of a certain dental business which he was carrying on in rooms at No. 12A, Tremont Row, in Boston, under the name and style of "Dr. Daly," displaying the signs, both within and without the premises, "Dr. Daly," and "Dr. Daly, Dentist."

On the day above named Robert E. Daly, by bill of sale of that date, sold to the plaintiff the good will of the business, together with the right to use the name of "Dr. Daly" at that place, the same as then used by him.

The plaintiff on that day took possession of the premises and the business under and by virtue of the bill of sale, and at once proceeded to carry on the practice of dentistry under the name and style of "Dr. Daly," and has ever since carried on the dental business under that name, advertising extensively the business under the name of "Dr. Daly," and "Dr. Daly, Dentist," as had previously been done by Daly.

On or about September 15, 1898, the three defendants, fraudulently and with intent to deceive the public, and for the purpose of attracting the patients of the plaintiff into the place of business of the defendants, opened dental rooms at No. 10 Tremont Row, in Boston, near the place of business of the plaintiff, under the firm name and style of "Dr. Daly," displaying the signs in various conspicuous places, "Dr. Daly," and "Dr. Daly, Dentist," both within and without the premises, which signs are

similar in appearance to those used by the plaintiff, and have continued to carry on the business under that name and style, and to make use of such signs, ever since and up to the date of the filing of the bill, to the great damage of the plaintiff's business.

By reason of the similarity of names and signs used by the defendants to those of the plaintiff, the public is thereby deceived, and mistakes occur, in that patients seeking the place of business of the plaintiff go to the place of business of the defendants and have their dental work done at that place, to the great damage of the plaintiff's business.

The defendants, their agents, employees, and servants, intentionally assist in deceiving the public, and in causing mistakes to occur to their advantage, and to the great damage of the plaintiff.

The prayer of the bill was that the defendants might be restrained from thereafter in any manner using the words "Dr. Daly," or "Dr. Daly, Dentist," or any word or words similar in sound or appearance to such words, in or upon any sign, card, or advertisement, or otherwise in connection with or in carrying on the practice of dentistry at the premises No. 10 Tremont Row, or at any premises on Tremont Row, or on any premises on Court Street, in Boston, within three hundred yards of No. 10 Tremont Row; and for an accounting of the damage done by the defendants to the plaintiff; and that the defendants be ordered to pay to the plaintiff the sum so found to be due him.

An interlocutory decree was entered, reciting that the court found that the acts charged in the bill were done by the defendants for the purpose and with the intent of attracting the patients of the plaintiff into the place of business of the defendants at No. 10 Tremont Row in Boston; that by reason of the fraudulent acts set out in the bill, which were proved, sundry persons had been deceived and induced to go to the defendants' place of business and have dentistry work performed there under the belief that it was the plaintiff's place of business; that the defendants were engaged in intentionally deceiving the public, to their own advantage and the damage of the plaintiff; and that the plaintiff had suffered damage by the acts of the defendants; ordering an injunction to issue, restraining the defend-

ants from carrying on business at No. 10 Tremont Row, or at any place in the vicinity of the plaintiff's establishment, in the manner in which they were carrying on such establishment at No. 10 Tremont Row, "and from displaying signs similar to those of the plaintiff, and from fitting up the windows, doorways, and front part of any office to be occupied by them in a manner to resemble or imitate the plaintiff's windows, doorways, signs, and office, and from doing any act to deceive the public into a belief that the defendants' establishment is the plaintiff's"; and commanding the defendants forthwith to take down and remove all signs, fittings, or other representations or displays at No. 10 Tremont Row, resembling or imitating the arrangement, signs, fittings, or displays at the plaintiff's doorway and window at No. 12A Tremont Row; and referring the case to a master to assess the damages.

Upon the coming in of the master's report, assessing the plaintiff's damages at twenty dollars, a final decree was entered affirming the report, and making the injunction theretofore issued perpetual; and the plaintiff appealed to this court.

C. W. Noyes, for the plaintiff.

M. W. Brick & A. H. Stetson, for the defendants, were not called upon.

HOLMES, J. It is enough to say that it does not appear, as matter of law, from the facts set forth in the decree, that the plaintiff was entitled to more relief than was granted. The judge must be taken to have found as an additional fact that more was not necessary to protect the plaintiff's rights and could not be granted with justice. We cannot say that such a finding was impossible, and we cannot revise the finding as the evidence is not before us.

Decree affirmed.

MEHITABLE GATES vs. JOHNSTON LUMBER COMPANY.

Middlesex. January 25, 1899. — January 26, 1899.

Present: HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Equity — Remedy at Law.

One who has sold bricks upon his own land, to be removed within a certain time, cannot maintain a bill for an injunction against the purchaser's removing them at a later date.

BILL IN EQUITY, filed May 29, 1897, alleging the following facts.

The plaintiff was the owner of a certain parcel of land in Southborough. On July 18, 1896, there was on said parcel a quantity of bricks, the title of which was partly in one Rooke, an insolvent debtor, and in the plaintiff as mortgagee. By her consent, the same was sold at public auction to the defendant company by the assignee of Rooke, to be removed and taken away in a fortnight's time from that date, July 18, and she notified the defendant to remove and take away the bricks within that time. Afterwards the defendant promised so to do, and the plaintiff gave the defendant until August 31, 1896, to remove and take away the same, and refused and continued to refuse to give the defendant company permission further to enter upon the premises for any purpose whatsoever, and posted notices against all trespassers according to law.

The defendant wholly neglected to remove the bricks; and notwithstanding the plaintiff's refusal of permission to enter upon the premises to remove the same after the time set therefor and extended for that purpose as aforesaid, the defendant broke into the premises against the plaintiff's will and permission and trespassed thereon, and took and carried away therefrom certain bricks, the property of the plaintiff, and threatened to continue so to do for an indefinite period.

The prayer was for an injunction, and that the defendant be required to pay the plaintiff the value of the bricks unlawfully removed, and such other damages as were caused by the trespass.

The defendant demurred, assigning as ground therefor that the plaintiff had a plain, complete, and adequate remedy at law. The Superior Court sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

S. H. Dudley, for the plaintiff.

H. S. Fay, for the defendant, was not called upon.

HOLMES, J. It is not alleged that the entry by the defendant for the purpose of removing its own property will do the plaintiff any harm beyond a purely technical trespass, nor that the defendant is not able to pay the plaintiff any damages which she may recover, nor that the plaintiff cannot prevent the trouble by removing the bricks from her land. She has no right to appropriate them because they were not removed within the time allowed at the sale.

Decree affirmed.

JOSEPH D. JEWETT, executor, *vs.* JOHN B. TURNER,
executor, & another.

Hampden. September 27, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, LATHROP, BARKER,
& HAMMOND, JJ.

*Declination of Appointment as Executor — Petition for leave to retract, and
for Appointment as Co-executor.*

J., one of two executors named in the will of T., declined appointment in January. In February, T., the other executor, filed a petition for the probate of the will and for letters testamentary. On March 8 the will was proved, and letters were granted to T. An appeal was taken, and on June 11 the decree of the Probate Court was affirmed. On July 1, J. filed a petition for leave to withdraw his renunciation and to be appointed executor jointly with T. On July 2, T. filed his bond and took out letters. On July 29 the Probate Court made a decree that letters testamentary should issue to J. as co-executor with T. *Held*, that after June 11 it was too late for J.'s petition to be entertained, supposing that further proceeding upon it would not have been cut off on July 2 by T.'s receipt of his letters after giving bond.

APPEAL, by John B. Turner, executor of the will of William W. Thayer and Henrietta B. Thayer, widow of William, from a decree of the Probate Court appointing Joseph D. Jewett co-

executor with Turner of said will. Hearing before *Knowlton, J.*, who, deeming the questions of law doubtful, reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in September, 1898, and afterwards was submitted on briefs to all the justices.

J. L. Rice, for the petitioner.

W. S. Robinson, for the respondent.

HOLMES, J. Jewett, one of two executors named in the will of Thayer, declined appointment in January, 1897. In February, Turner, the other executor, filed a petition for probate of the will and for letters testamentary. On March 8, 1897, the will was proved, and letters were granted to Turner. An appeal was taken, and on June 11 the decree of the Probate Court was affirmed. On July 1, 1897, Jewett filed a petition asking leave to withdraw his renunciation, and to be appointed executor jointly with Turner. On July 2, Turner filed his bond and took out his letters. On July 29, 1897, the Probate Court made a decree that letters testamentary should issue to Jewett as co-executor with Turner. This decree was appealed from, and the question whether it was within the power of the Probate Court to make is before us by report.

We are of opinion that after letters of administration have been granted, while the decree which granted them stands, the power of the Probate Court is exhausted. When one of two persons named as executors refuses to accept the trust, the court is required to grant letters to the other, if he is willing to accept. Pub. Sts. c. 129, § 3. By Pub. Sts. c. 130, § 6, under certain circumstances, "before letters of administration with the will annexed have been granted, the court may grant letters testamentary," etc. This implies that the power is exhausted when letters have been granted, and the question is narrowed to fixing the point of time when the grant shall be deemed complete for this purpose. This question would not be illuminated by lengthy discussion. We appreciate what can be said in favor of regarding the proceedings as open at least until a bond has been filed, but we think that convenience on the whole is in favor of the moment when the decree is passed. It follows that after June 11 it was too late for Jewett's petition to be entertained,

supposing that further proceeding upon it would not have been cut off on July 2 by Turner's receipt of his letters after giving bond.

Decree reversed.

CATHERINE A. BROWN, administratrix, *vs.* GREENFIELD
LIFE ASSOCIATION.

SAME *vs.* SAME.

Hampden. September 28, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Erroneous Instructions — Action by Executor or Administrator on Life Insurance Policy — Exceptions — Assignment of Life Insurance Policy — Application — Misrepresentations — Questions for Jury — Consumption — Risk of Loss.

It cannot be said that verdicts rendered under erroneous instructions shall stand, when it appears that any defence will be open on a new trial.

The St. 1894, c. 225, relative to actions on life insurance policies, is construed to allow an executor or administrator to sue when the assent of the beneficiary to whom the policy is payable appears or is to be presumed, no action being instituted by the beneficiary himself.

In an action on a life insurance policy there is no ground of exception to the exclusion of questions put to the beneficiary, who had assigned the policy to another as security for money due, as to when that indebtedness was paid, and whether it was paid before the death of the insured, as it is immaterial whether the indebtedness was paid before the death of the insured.

As in an action on a life insurance policy the defences which might be made if the application were part of the contract were in fact on trial by the jury, the evidence as to applications by the insured to other insurers was relevant and competent upon the issue whether his alleged misrepresentations to the defendant company were made with actual intent to deceive.

In an action on a life insurance policy there is no error in the ruling that the jury are to disregard those questions in the applications to which no answer was made.

The credibility of witnesses and the weight of evidence are for the jury.

Consumption is a disease of such a nature that, as matter of law, a misrepresentation as to it in an application for life insurance is a misrepresentation as to a matter which increases the risk of loss.

TWO ACTIONS OF CONTRACT, to recover the amount of two policies of life insurance for one thousand dollars each, upon the life of Charles P. Brown.

The beneficiary named in one of the policies was the wife of the insured, and in the other was George H. Graham. This last named policy had been assigned to one Robert A. Murray. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions, which appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

W. H. McClintock, (*J. B. Carroll* with him,) for the plaintiff.

BARKER, J. The plaintiff now contends that, upon inspection of the original policies and applications, which are before us, it appears that there are such substantial discrepancies between the applications and the copies annexed to the policies as to require it to be held as it was held in *Nugent v. Greenfield Life Association*, ante, 278, that the applications were not admissible in evidence or parts of the contracts, and that the defences founded upon alleged misrepresentations by the insured were not open, and that therefore the defendant's exceptions should be overruled because it was not harmed by any errors at the trial. But we think it would be going too far for us to say that verdicts rendered under erroneous instructions shall stand, when it appears that any defence will be open upon a new trial. Here all the allegations of the declarations are denied by the answers, and it cannot be said that no other result than fresh verdicts for the plaintiff can come from a new trial.

One exception is to the refusal to rule that the actions cannot be maintained by the present plaintiff as administratrix of the estate of the insured. One policy is made payable to her individually, and the other to one Graham, while each is made payable to the executors or administrators of the insured if the beneficiary named is not living at the death of the insured. The defendant contends that, although an administrator may ordinarily sue upon a contract made with his intestate, we have two statutes, St. 1894, c. 225, and St. 1894, c. 522, § 73, each of which gives to the beneficiary named in these policies the right to sue in his own name, and that the right so given takes away the right of the administratrix of the insured to maintain these suits.

There are instances in which an action may be brought by either of two persons. See *Palmer Savings Bank v. Ins. Co. of*

North America, 166 Mass. 189. It is not a necessary consequence of the giving by statute a right to sue to the beneficiary that the statute wholly takes away the common law right of the administratrix. Nor is it clear that either of the statutes cited applies to policies of assessment insurance. The provision of St. 1894, c. 522, § 73, allowing a person to whom a policy of life insurance is made payable to bring suit upon it in his own name, is not contained in or derived from St. 1887, c. 214. It follows from this fact, and from the decision in *Stocker v. Boston Mutual Life Association*, 170 Mass. 224, that policies of assessment insurance are not dealt with by this provision of St. 1894, c. 522, § 73. There are also reasons for holding that policies of assessment insurance are not within the operation of St. 1894, c. 225. That statute is entitled "An Act to authorize the beneficiary of a life insurance policy to maintain an action thereon in his own name," and the body of the statute is as follows: "Section 1. The person to whom a policy of life insurance, hereafter issued, is made payable, may maintain an action thereon in his own name. Section 2. This act shall take effect upon its passage." This language would have been used if the Legislature had in mind premium insurance only, while if they had meant to include also assessment insurance and that written by fraternal benefit societies, the statute would more naturally have said, "The person to whom a benefit certificate, or a certificate or policy of life insurance, is made payable, may maintain an action thereon in his own name." Besides this, the statute has been treated as superseded and repealed by St. 1894, c. 522. In the supplement to the Public Statutes, (issued under authority of St. 1895, c. 363,) St. 1894, c. 225, is said to be superseded by St. 1894, c. 522, § 73, and to be repealed; and in the tables of changes in the general laws published by direction of St. 1895, c. 363, in the supplement just mentioned, and also in the tables of changes in the general laws prepared yearly under the provisions of St. 1882, c. 238, and published in the volumes of Acts and Resolves for the years 1894, 1895, 1896, 1897, and 1898, the St. of 1894, c. 225, is said to be superseded by St. 1894, c. 522, § 73. This points to the conclusion that, notwithstanding the generality of its language, the Legislature intended the provisions of St. 1894, c. 225, to apply only to premium insurance, in which case only could it be

said to be superseded and repealed by St. 1894, c. 522. However this may be, and even if the provisions of St. 1894, c. 225, were merely duplicated as to premium insurance by St. 1894, c. 522, § 73, and not superseded or repealed, we are of opinion that in the circumstances disclosed by the bill of exceptions the plaintiff as administratrix can maintain these actions. The statute does not in terms forbid the executor or administrator to sue, and, while it is to be so construed as not to subject an insurer to two judgments for one cause of action, the statute is in derogation of the common law, and may have effect without wholly taking away the power of an executor or administrator to sue. We may fairly construe the statute to allow an executor or administrator to sue when the assent of the beneficiary to whom the policy is payable appears or is to be presumed, no action being instituted by the beneficiary himself. In one of these cases the person who sues as administratrix of the insured is the beneficiary, and her assent must be assumed. In the other case the beneficiary is a different person, but it is not contended that he has himself instituted any suit. It appears that he knew of this suit, for he was present at the trial, being summoned as a witness by the plaintiff, and put upon the stand by the defendant. One condition of the policy is that no suit shall be brought upon it unless within one year after the death of the insured, who died on February 4, 1897, so that now no other suit can be brought. In this case also it should be assumed that the suit was brought and is prosecuted with the assent of the beneficiary. If the statute applies to these policies, it precludes an executor or administrator of the insured from maintaining an action without the assent of the beneficiary, if the latter desires to sue and brings his suit within a reasonable time; and his rights cannot be injuriously affected by a prior suit brought by an executor or administrator of the insured. But if the beneficiary does not exercise his own right to sue, an executor or administrator of the insured may, with the assent of the beneficiary, maintain an action notwithstanding the statute. The exception to the refusal to hold that the actions could not be maintained by the present plaintiff must therefore be overruled.

Another exception, not connected with those which arise as

to St. 1890, c. 421, § 21, is that to the exclusion of the questions put to Graham, the beneficiary in the second policy, who had assigned it to one Murray as security for money due, as to when that indebtedness was paid, and whether it was paid before the death of the insured. It would dispose of this exception to say that the bill of exceptions does not disclose what answer was expected to these questions. We prefer to say that it was immaterial whether the indebtedness was paid before the death of the insured. The policy in its inception was not a wagering contract. *Campbell v. New England Ins. Co.* 98 Mass. 381. And an assignment of a policy issued to one who has an insurable interest is not void because made to one who has no such interest. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24. The same considerations require us to overrule also the exception to the refusal to give the seventeenth request, that the action on the Graham policy could not be maintained.

The remaining exceptions, whether to the admission or exclusion of evidence, the refusal of instructions to the jury, or to the charge, are as to matters concerning the defences under the applications, and we deem it unnecessary to discuss them all. As the defences which might be made if the applications were part of the contracts were in fact on trial by the jury, the evidence as to applications by the insured to other insurers was relevant and competent upon the issue whether his alleged misrepresentations to the defendant were made with actual intent to deceive. There was no error in the ruling that the jury were to disregard those questions in the applications to which no answer was made. *Nugent v. Greenfield Life Association*, ante, 278. Subdivision 10 of the application, — “10. The following are all the companies or associations to which I have ever applied for any life insurance which has been refused on the plan asked for, or postponed,” — was in reality a question, and did not become a statement of the applicant by being left unanswered.

The substance of the whole evidence is set out in the bill of exceptions to the extent of more than fifty printed pages of oral testimony, to enable the defendant to contend here that the verdicts were against the weight of the evidence, and very much of the defendant's brief and argument is addressed to that ques-

tion. It is enough to say, in overruling that exception, that it could not be sustained without holding that the jury were bound to find in accordance with the testimony of witnesses called by the defence, and much of whose testimony was as to the acts and declarations of the deceased, and tending to show him guilty of fraud. The answer to the exception is, that the credibility of witnesses and the weight of evidence are for the jury.

Without discussing the rulings refused and given as to other diseases, there was error in the manner in which the court below treated the defence that the insured had consumption. We think that to be such a serious disease that, if there is a misrepresentation as to it by the insured in obtaining life insurance, the misrepresentation must be held, as matter of law, to be a misrepresentation as to a matter which increased the risk of loss, within the meaning of the clause relating to that subject in St. 1894, c. 522, § 21, which clause, having been part of St. 1887, c. 224, is, in accordance with the decision of *Conside v. Metropolitan Ins. Co.* 165 Mass. 462, applicable to assessment insurance. Hence it was wrong to refuse the instruction to that effect requested by the defendant, and it was also wrong to leave it to the jury whether, if the insured had consumption at or before the time of his application for insurance, that fact did or did not increase the risk of loss. Some diseases or bodily conditions are of such a nature that the question whether they increase the risk of loss is for the jury. Rupture was said to be of that class in *Levie v. Metropolitan Ins. Co.* 163 Mass. 117. On the other hand, there are conditions and diseases of a nature which requires it to be held, as matter of law, that a misrepresentation as to them is one as to a matter which increases the risk of loss, within the meaning of the statute. That the applicant was addicted to the excessive use of intoxicating liquors was held to be such a matter in *Rainger v. Boston Mutual Life Association*, 167 Mass. 109. Consumption is of this latter class. The charge was also wrong in intimating that the plaintiff might recover even if the insured had consumption when he obtained his insurance, unless he died of the consumption to which he was then subject. Whether his misrepresentation as to consumption was as to a matter which increased the risk of loss did

not depend upon whether he died of the disease, but upon whether the fact that he had consumption increased the risk that he would soon die. *Exceptions sustained.*

JOHN MCCOY vs. INHABITANTS OF WESTBOROUGH.

Worcester. October 5, 1898. — February 28, 1899.

Present: FIELD, C. J., KNOWLTON, MORTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Sewer — Master and Servant — Act of Superintendence — Negligence — Assumption of Risk — Law and Fact — Due Care.

In an action against a town under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while engaged in digging a sewer trench, by reason of the bank, upon which the defendant's superintendent was standing at a place where there was a crack in the earth, falling upon him, it is competent for the jury to find that the superintendent, who had general control of the whole work of digging the trench, in walking along the bank and in stopping to look down at the workmen, was engaged in an act of superintendence; and it is for the jury to say whether, in view of the crack in the earth, it was negligent for him to stand where he did without giving any warning.

If the bank of a sewer trench has been cracked by the blasting of rock in the line of the sewer, and a person employed in digging the trench is injured by the falling of the bank upon him, in the absence of anything to show whether such cracks are liable to occur in digging and blasting out trenches for sewers, and if so, how frequently, and whether he should have anticipated it, it cannot be ruled, as matter of law, in an action for the injury, that the risk was one which the plaintiff assumed; and although he was not set to work in the particular place where he was injured, and was an experienced workman, he had a right to rely somewhat upon the defendant's superintendent as to the safety of the place where he was working, and it is for the jury to say whether he was in the exercise of due care.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of the defendant's superintendent. Trial in the Superior Court, before Bond, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that the plaintiff was employed in digging a sewer trench in the defendant town, the trench being dug under the direction of one Brainard Putnam, superintendent of sewers in the town, and that the plaintiff was engaged

in blasting rock in a line of the sewer, his occupation being that of holding the drill while two other men were engaged in striking the drill. The plaintiff testified that he, and the men engaged with him, went to work in the morning drilling a hole in the rock near the surface of the ground, and a charge of dynamite had been placed in this hole, and the rock had been blasted at this place; that the only orders that he received from the superintendent were orders to go to work blasting rock, without any direction as to where he should do the work; that he went to work at another point, where the ditch was from four to six feet deep, and where the earth had fallen in from the sides of the ditch and been thrown out, the falling of the earth being caused by the blasting which had been done; and that he went to work at this particular place of his own motion, and without any direction from the superintendent. It appeared that this earth had fallen, in some places, in such a way that the top or crust of the earth extended over the ditch below. While the plaintiff was engaged in holding the drill at this place, the superintendent walked along upon the bank and stopped there, looking down at the workmen, and while so standing, the earth, with the superintendent upon it, fell into the ditch and against the shoulders and back of the plaintiff, and caused the injuries complained of. It appeared in evidence that the plaintiff had been engaged for many years in digging ditches and blasting rocks, and was familiar with such work. It did not appear that the superintendent at this time gave any directions in regard to the work or had any control of the work at this point, except as it appeared in evidence that he had general control of the whole work of digging the sewer trench. One of the witnesses, not in any way connected with the work, testified that he saw a crack in the earth ten or twelve feet long, which was extended around the place where the superintendent was standing when looking at the plaintiff and others at work in the ditch, but it did not appear that the superintendent, or any person connected with the work, saw this crack in the earth, or had their attention in any way called to it.

At the close of the evidence, the defendant asked the judge to rule that there was no evidence of due care on the part of the plaintiff; and that there was no evidence of negligence on the

part of the defendant, the defendant contending that the acts done by the superintendent, as testified to by the plaintiff and other witnesses, were not acts of superintendence, and the defendant was in no way responsible therefor. The judge refused so to rule.

The jury were fully instructed as to the duty of the plaintiff to prove that he was in the exercise of due care, and as to the risk which he assumed while engaged in his work. With reference to the condition of the side of the trench where the evidence tended to show there was a crack, the judge instructed the jury as follows: "That leads me to call your attention to a matter which perhaps he did not see and did not know of, because he could not see it down in the ditch where he was at work. That is, the condition of the bank, the hard portion of the road-bed — crust, if I may so refer to it — had been cracked away, not that it had fallen, but there was a visible crack in it at the place where it finally broke down, and it was that part that was between the ditch and that crack that finally went down. Now, if the plaintiff did not know that, if he did not understand that was the condition of things, and that added to the danger, then he did not know and appreciate the danger. It is for you to say whether that was the condition, because you can see the importance of that in determining this question, whether that was the truth with reference to that bank at that time. Had the under part of this bank broken down so that there was a portion of the road-bed, the hard firm part of it, hanging over with no support under it, and had it in addition to that a crack, whether from the weight being unsupported or whether from a jar that was received from the blasting, or from the constant jar that might come there from drilling and to some extent by the use of the road by teams outside of this, had that crack opened so there was but little to hold it, that part which finally fell off? If so, and that added to the danger, that was not one of the risks that the plaintiff knew and appreciated, and therefore assumed. If it could not be seen down in the ditch, it was not his duty to go outside and inspect, because, as I have already said to you, he had a right to rely upon the duty of the master, and that the master would perform his duty toward him with reference to the place where he was at work. It was his duty to go on and

do his work, and he had the right to rely upon the master doing what belonged to him to do."

The jury were fully instructed as to the duty of the defendant towards the plaintiff, to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. E. Beeman, for the defendant.

W. A. Gile, for the plaintiff.

MORTON, J. The defendant contends that the court erred in refusing to rule, first, that the accident was one of which the plaintiff had assumed the risk, and secondly, that the acts of the superintendent in walking along the bank and stopping to look down at the workmen were not acts of superintendence.

The exceptions do not state what instructions were given in regard to what would constitute acts of superintendence. It appears that the superintendent "had general control of the whole work of digging the sewer trench"; and we think that it was competent for the jury to find that, in walking along the bank, and in stopping to look down at the workmen, the superintendent was exercising an oversight of the work, and therefore was engaged in an act of superintendence. *Cashman v. Chase*, 156 Mass. 342. It was for the jury to say whether, in view of the crack in the earth, it was negligent for the superintendent to stand where he did without giving any warning.

It is true, as the defendant contends, that the workman assumes the risk of such transitory changes as are incident to and ordinarily may be expected to occur in the prosecution of the work in which he is engaged, whether arising from the operation of natural causes or otherwise. *McCann v. Kennedy*, 167 Mass. 23. *O'Neil v. Keyes*, 168 Mass. 517. *Beique v. Hosmer*, 169 Mass. 541. But in the present case there was nothing to show whether cracks, like that shown to have existed here, are liable to occur in digging and blasting out trenches for sewers, and if so how frequently, and whether the plaintiff should have anticipated the crack which occurred; and we think, therefore, that it could not be ruled, as matter of law, that the risk was one which the plaintiff assumed. Though the plaintiff was not set to work in the particular place where he was injured, and was an experienced workman, we think that he had a right to rely

somewhat upon the superintendent as to the safety of the place where he was working, and it was for the jury to say whether he was in the exercise of due care. *Hennessey v. Boston*, 161 Mass. 502. *Coan v. Marlborough*, 164 Mass. 206. The exceptions state that "the jury were fully instructed as to the duty of the plaintiff to prove that he was in the exercise of due care," and "as to the duty of the defendant towards the plaintiff," to all which, as we understand, no exception was taken. We think that the exceptions must be overruled. *So ordered.*

OLIVE A. PIERCE vs. MARIA LE MONIER & another.

Worcester. October 6, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Equity — Parties — Mortgage — Bill to redeem — Husband and Wife — Fraud — Accounting.

If a bill in equity is brought by a married woman to redeem land which had been conveyed to her by her husband from a mortgage given by them to one of the defendants and assigned to the other, and a master's report finds that nothing is due on the mortgage to either defendant, but that a third person has an equitable claim under it as security for an amount due him from the plaintiff and her husband, and the decree entered thereon directs the plaintiff to pay him such sum, and after such payment the mortgage to be discharged, both the third person and the plaintiff's husband should be made parties to the bill before the case can properly be finally disposed of.

Where land has been conveyed by a husband to his wife, and by them mortgaged to a third person in order to prevent it from being reached by the husband's creditors, it is not necessary, in order to maintain a bill in equity to redeem the land, to show that the transaction has been purged of the fraud which led to the conveyance and mortgage; but if accountings have taken place between the mortgagors and a third person, who is found to have an equitable claim under the mortgage as security for an amount due him from them, such accountings must be regarded as settling the amounts due under the mortgage when they were had, and the objection that they related to sums advanced subsequently to the giving of the mortgage cannot prevail, if it is found that it was understood and agreed between the parties that the mortgage should stand as security for such sums.

BILL IN EQUITY, filed February 27, 1894, in the Superior Court, and amended May 31, 1894, against Maria Le Monier

and A. L. Warner, for an accounting and for the redemption of certain land in Paxton from a mortgage given by the plaintiff to the defendant Le Monier, and by her assigned to the defendant Warner.

The case was referred to a master, who found and reported that on June 5, 1886, Frank W. Pierce, the husband of the plaintiff, conveyed the real estate in question through a third person to her, the same being a voluntary conveyance without consideration; that on August 28, 1886, the plaintiff and her husband, without any consideration therefor, and for the purpose of encumbering said real estate and preventing the same from being attached or taken on execution by the creditors of Frank W. Pierce, and especially from being attached and taken on execution by one Samuel C. Cochran, to whom Frank W. Pierce had indorsed a certain note for the accommodation of one Walter O. Cook, gave the defendant Le Monier a note for \$2,500, secured by the mortgage described in the plaintiff's bill; that this attempt to cloud the title to the real estate was participated in by the plaintiff and her husband, and the defendant Le Monier and her husband, George C. Le Monier, the husbands being the active participants and acting as the agents of their respective wives, who assented thereto; that subsequently Cook paid the note which was indorsed by Frank W. Pierce, and Pierce paid all his other indebtedness existing at the time of the conveyance and mortgage; that subsequently, in September, 1886, George C. Le Monier loaned Frank W. Pierce \$400, which was understood by the plaintiff to be secured by the mortgage, and in February, 1887, she gave George C. Le Monier a note for that amount, payable to the defendant Le Monier, in settlement of the amount due him from her husband; that on April 22, 1887, the defendant Le Monier assigned the mortgage and note for \$2,500 to the defendant Warner, at the suggestion of George C. Le Monier; that the note was then overdue and open to the equities existing between the original parties, and Warner held the same for the accommodation of the defendant Le Monier and George C. Le Monier, who assumed ownership and control over the same in their dealings with the plaintiff and her husband; that at this time George C. Le Monier was indebted to Warner in a sum larger than the face of the mort-

gage; that the note for \$400 was not assigned, but in the fall of 1887, and subsequently to such assignment, the plaintiff and her husband and George C. Le Monier had an accounting together, and it was agreed that there was due to the last named \$380; that subsequently a payment of \$250 was made by Frank W. Pierce to George C. Le Monier on account of the indebtedness of \$380; that afterwards George C. Le Monier made further loans to Frank W. Pierce, which were understood by the plaintiff to be secured by the mortgage; that on September 12, 1892, George C. Le Monier and Frank W. Pierce had a further accounting together, and agreed that there was due George C. Le Monier \$525, of which sum Pierce paid \$475 on account; that some time after 1890, the plaintiff and her husband had knowledge of the assignment to the defendant Warner, and subsequently to September 12, 1892, demanded an accounting with both defendants, and was referred by Warner to the defendant Le Monier and her husband, saying that any settlement with them would be satisfactory; and that the defendant Le Monier and her husband demanded the full sum of \$2,500, and refused to deliver up the note and discharge the mortgage unless this sum was paid.

The master found that, upon the evidence, there was due on September 12, 1892, from Frank W. Pierce and the plaintiff to George C. Le Monier the sum of \$50 and interest thereon from that date, at the rate of five per cent per annum, amounting in all to \$62.37.

The master further found, as matter of law, that the defendant Warner had only the naked legal title to the mortgage, without any further interest therein, and that there was nothing due him thereon; that there was nothing due the defendant Le Monier on the mortgage, but that George C. Le Monier had an equitable claim under the mortgage as security for the sum of \$50 and interest; and that the payment of the Cochran note, and the payment by Frank W. Pierce of all his other indebtedness existing at the time of the conveyance and mortgage, purged the transaction of the fraud intended and committed, and, although the plaintiff participated in the original fraudulent scheme, yet the same having been abandoned and purged, she was entitled to the relief sought, and to have the mortgage dis-

charged upon the payment of the \$50 and interest to George C. Le Monier.

The defendant Le Monier excepted to the last finding of the master, and the defendant Warner filed several exceptions, which are not material to be stated.

The plaintiff excepted to the refusal of the master to find, as matter of law, that the accountings between the plaintiff, her husband, and George C. Le Monier, entitled her to redeem, notwithstanding the original fraudulent nature of the mortgage.

At the hearing, the exception of the defendant Le Monier was overruled, the plaintiff's exception was sustained, the master's report, except as to the matter covered by the plaintiff's exception, was accepted and confirmed, and a decree was entered directing the plaintiff to pay George C. Le Monier the sum of \$62.37, with interest at five per cent from August 23, 1897, to the day of payment, and that within ten days after such payment by the plaintiff the defendant Warner should discharge the mortgage; and the defendants appealed to this court, the appeal of the defendant Warner being waived subsequently.

F. B. Smith, for the defendants.

R. B. Dodge, Jr., for the plaintiff.

MORTON, J. The master has found that the defendant Warner holds the naked legal title to the mortgage, but that he has no further interest in the same, and that there is nothing due him thereon; and that the defendant Maria Le Monier has no equitable title to said mortgage, and that there is nothing due her thereon. The master has also found that George C. Le Monier has an equitable claim under said mortgage as security for the amount due him from the plaintiff and her husband, which he has found to be \$50 and interest, amounting in all to \$62.37. The decree directs the plaintiff to pay the said George C. Le Monier said sum with interest at five per cent from August 23, 1897, to the day of payment, and further directs that within ten days after said payment the said Warner shall discharge the mortgage. Neither George C. Le Monier nor the plaintiff's husband is a party, and we think that, before the case properly can be finally disposed of, both should be made parties. Probably it will not be necessary to send the case back to the master. See *Browning v. Carson*, 163 Mass. 255. But, in order

that the rights of all persons in interest may be concluded, we think that they should be made parties. See *Nelson v. Ferdinand*, 111 Mass. 300; *Coles v. Forest*, 10 Beav. 552.

The defendant Warner has waived his appeal, and the exceptions taken by him to the master's report are not before us. The only exception to the master's report which is before us is that of Maria Le Monier. The exception is to the finding of the master that the payment of the Cochran note, and the payment by the plaintiff's husband of all his other indebtedness existing at the time, purged the transaction of the fraud intended and committed by the conveyance to the plaintiff and by the mortgage executed by her, and that upon payment to George C. Le Monier of the amount due him she is entitled to redeem.

We think that the exception must be overruled, though not upon the ground taken by the plaintiff. The case has been argued by the plaintiff, as it apparently was treated by the master, as if, in order to entitle the plaintiff to redeem, she must show that the transaction had been purged of the fraud which led to the conveyance and the mortgage. Possibly the case could stand on that ground. See *Carll v. Emery*, 148 Mass. 32; *Harvey v. Varney*, 98 Mass. 118; *Crowninshield v. Kittridge*, 7 Met. 520; *Oriental Bank v. Haskins*, 3 Met. 332; *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469. But it seems to us that there is another and a better view on which the action of the Superior Court in overruling the exception can be sustained. As between the parties to the deed and the mortgage, those conveyances were valid. *Stillings v. Turner*, 153 Mass. 534. *Harvey v. Varney* and *Crowninshield v. Kittridge*, *ubi supra*. *Dyer v. Homer*, 22 Pick. 253. They were fraudulent only as to creditors, and voidable only by them. The plaintiff is not seeking to set aside the mortgage on the ground of the alleged fraud, or for any other reason, and she is not obliged in order to obtain the relief which she desires to rely upon the alleged fraud. On the contrary, by seeking to redeem she affirms or acknowledges the validity of the mortgage. Cases therefore on which the defendant relies, in which it was sought to obtain a reconveyance of property which had been fraudulently conveyed, do not apply, and it is not necessary to consider

whether the original transaction which led to the deed and mortgage has been purged of fraud. The accountings which took place, as the master has found, between the parties, must be regarded as settling the amounts due under the mortgage when they were had, and the objection that they related to sums advanced subsequent to the giving of the mortgage, cannot prevail in view of the fact that the master has found in substance that it was understood and agreed between the parties that the mortgage should stand as security for the sums so advanced. *Stone v. Lane*, 10 Allen, 74.

Case remitted to the Superior Court for further proceedings in accordance with this opinion.

GRAFTON NATIONAL BANK vs. OLIVER M. WING,
administrator.

GRAFTON SAVINGS BANK vs. SAME.

Worcester. October 7, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Promissory Note — Liability of Indorser — Agency.

The indorsement on a promissory note "Estate of Jona. D. Wheeler, Henry F. Wing, Executor," means "estate of Wheeler by Wing," and therefore fails to bind Wing by contract.

TWO ACTIONS OF CONTRACT upon promissory notes. The first of the notes in the first case was as follows:

"\$2,000.^{no}/₁₀₀. Grafton, February 1st, 1892. Four months after date we promise to pay to the order of ourselves two thousand dollars at Grafton National Bank. Value received. Wheeler Cotton Mills, Henry F. Wing, Treas'r."

Indorsements:

"Waiving demand and notice. Wheeler Cotton Mills, Henry F. Wing, Treas. Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

The second note was for \$3,000, and was otherwise identical with the first note except that it was dated February 17, 1892.

The following is a copy of the note in the second case:

"\$8,000.^{no}₁₀₀. Grafton, March 2d, 1892. One month after date the Wheeler Cotton Mills promise to pay to the order of the Grafton Savings Bank eight thousand dollars with interest at 4½ per cent per annum at Grafton Savings Bank. Value received. Wheeler Cotton Mills, by Henry F. Wing, Treas."

Indorsements:

"September 30, 1896. Three thousand dollars paid on the within note. W. H. Wheeler, Jno. D. Wheeler Estate, Henry F. Wing, Executor."

The cases were tried together without a jury, before *Hopkins, J.*, who allowed a bill of exceptions in substance as follows.

Henry F. Wing was the defendant's intestate, and was the treasurer of the Wheeler Cotton Mills, and also executor of Jonathan D. Wheeler's will. The plaintiff in each case had received a part payment under a compromise agreement with the Wheeler Cotton Mills, and the plaintiffs sought to hold Henry F. Wing's estate on the ground that he was personally liable.

George K. Nichols, the president of both the plaintiff banks, testified for the plaintiff that prior to the giving of the notes, which were given in renewal of former notes similarly indorsed, and which had been originally indorsed by Jonathan D. Wheeler and during the life of the notes in suit, he had told the defendant's intestate that the indorsements bound him personally, and not the estate of Jonathan D. Wheeler; that when Wing first gave them notes indorsed by the Wheeler estate and by himself as executor, they questioned his right to indorse those notes in that way, and from that time constantly took that position toward him; that Wing said he thought he had the right; that they took the notes with Wing's indorsements, feeling that he was good for them, and that he would be holden for them, and he was told so, and the banks consulted counsel and were told that that was true, and they told Wing what the counsel said, and he also testified that the indorsements were on the notes at their inception.

The defendant requested the judge to rule that the actions could not be maintained. The judge refused so to rule, and

found for the plaintiff in each case; and the defendant alleged exceptions.

J. B. Scott & T. H. Gage, Jr., for the defendant.

F. P. Goulding, (*W. C. Mellish* with him,) for the plaintiffs.

HOLMES, J. These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form: "Estate of Jona. D. Wheeler, Henry F. Wing, Executor."

A majority of the court are of opinion that these words mean "Estate of Wheeler by Wing," and therefore that at least they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of Wing's name upon the paper and his failure to bind his supposed principal are not enough to make the contract his own. *Jefts v. York*, 4 Cush. 371, and 10 Cush. 392, 395, 396. *Abbey v. Chase*, 6 Cush. 54, 56, 57. *Taylor v. Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it. See further 1 Dan. Neg. Instr. (4th ed.) §§ 306, 307, 308. *Bartlett v. Tucker*, 104 Mass. 336. It is true that it is suggested by Mr. Daniel that in such cases an ambiguous expression may be interpreted to bind the agent, but neither that suggestion nor a presumption that the agent knew the law can pervert words from their meaning if the meaning is plain. The so called presumption is a requirement, not a presumption of fact, and has no bearing or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained.

MOYSES R. SIMMONS vs. SAMUEL SHAW & others.

Plymouth. October 18, 1898. — February 28, 1899.

Present: FIELD, C. J., KNOWLTON, BARKER, & HAMMOND, JJ.

Judgment — Set-off — Review — Bond — Corporation — Ratification.

In an action against the principal and sureties on a bond, a judgment against the present plaintiff in another action, which has been assigned to the sureties only, cannot, under Pub. Sts. c. 168, § 8, be set off; and the contention that the present action must be treated as one against the sureties alone cannot be maintained, if, although the principal had not been served with process or entered his appearance when the declaration in set-off was filed, he appeared subsequently.

A petition for review of a judgment against a corporation, signed with the name of the corporation by its president, was filed, and the president affixed the signature and seal of the corporation as principal to a supersedeas bond, which was also executed by two sureties. During the period of more than a year that the petition was pending no suggestion was made that the petition and bond were not the acts of the corporation, and the corporation obtained a stay of the execution under the bond. In an action upon the bond, the corporation, by the same attorney who acted for the sureties, admitted its liability on the bond, and agreed that judgment should be entered against it, but the sureties continued the defence. *Held*, that there was sufficient evidence to support the finding that the corporation ratified the action of its president in executing the bond.

CONTRACT, upon a bond alleged to have been executed by the Scituate Water Company as principal, and by Samuel Shaw and Harry J. Jaquith as sureties, and given under a petition for the review of a judgment obtained by the plaintiff against the Scituate Water Company. At the trial in the Superior Court, before *Braley, J.*, the jury returned a verdict for the plaintiff; and the defendant sureties alleged exceptions. The facts appear in the opinion.

R. O. Harris, for the defendant sureties. -

A. E. Avery, (*H. Kingman & H. H. Pratt* with him,) for the plaintiff.

BARKER, J. The judgment against the plaintiff which the defendants Shaw and Jaquith sought to set off against him in this action was in form a judgment against him and two other persons. Whether, by reference to Pub. Sts. c. 167, § 4, it could be construed as a several judgment against the present plaintiff, it is not necessary to decide. When the present action was

brought, that judgment had been assigned to the defendants Shaw and Jaquith, and the Scituate Water Company, their co-defendant in this suit, had no interest in that judgment. For the reason that the judgment was not due to all of the defendants jointly, it could not be set off in the present action. Pub. Sts. c. 168, § 8. See *Walker v. Leighton*, 11 Mass. 140; *Warren v. Wells*, 1 Met. 80. The contention that the present action must be treated as a suit against the defendants Shaw and Jaquith alone is without foundation. The Scituate Water Company was a co-defendant with them, although it had not been served with process or entered its appearance when the declaration in set-off was filed. Without intimating that the circumstance that their co-defendant was not brought into court would have made any difference with the competency of the set-off if the Scituate Water Company had never been served with process or appeared in this suit, when that company did appear the rights of all parties were to be determined upon the basis that it was a co-defendant with Shaw and Jaquith, and the ruling that the judgment in which they alone had an interest could not be set off was right.

From the evidence it would be competent for the jury to find the following facts.

The defendant Jaquith was president and the defendant Shaw was a director of an incorporated bank. This bank had lent a large sum of money on notes given for the purchase of all the assets of the Smith and Winchester Company from the assignees of that company, and those assets were held by Shaw as a trustee, for his bank. Among those assets was a claim against the Scituate Water Company, and, if the judgment of the present plaintiff against that company should stand, it would impair the value of that claim, which Shaw as trustee wished to enforce for the benefit of the bank. Thereupon Jaquith, who was also a member of a law firm, directed his law partner to bring a petition for review of the judgment which had been rendered in favor of the present plaintiff against the Scituate Water Company. In this petition for review it became necessary to give a supersedeas bond, which must be executed by the Scituate Water Company as principal, and by the sureties. Henry H. Winchester was president of the water company, and he affixed the

signature and seal of that company to the bond now in suit, and the defendants Jaquith and Shaw executed it as sureties. The bond was then approved by a justice of the court, and a stay of execution was granted. The petition for review was signed with the name of the water company by Winchester as president. This petition was conducted by the defendant Jaquith's law partner as attorney for the petitioner, was heard in the Superior Court and there denied, and the petitioner's exceptions were overruled in this court by the decision reported in *Scituate Water Co. v. Simmons*, 167 Mass. 313. The most natural inference from the evidence is that the petition for review was in fact instituted and prosecuted under orders from the present defendant Jaquith, with the knowledge and assent of the defendant Shaw, for the benefit of the bank of which the former was president, of which both were directors, and of which Shaw was also a trustee.

Under these circumstances it would require but slight evidence to justify a finding against the defendants Jaquith and Shaw that the execution of the supersedeas bond by Winchester as the bond of the Scituate Water Company had been in fact ratified by that company. The petition for review was filed on September 25, 1895, it was heard in the Superior Court in November, 1895, and the petitioner's exceptions were heard in this court in November, 1896, and were overruled in January, 1897. During the long period in which the petition was pending, no suggestion was made that the petition and the bond given as one step in its prosecution were not the acts of the Scituate Water Company. On the contrary, the water company took advantage of the bond to obtain a stay of execution, and thereafter prosecuted the petition for more than a year.

Besides this, the water company at the trial of the present action, by the same attorney who now acts for the defendants Jaquith and Shaw, admitted its liability on the bond, and agreed that judgment should be entered against the company in this action. No vote of ratification was necessary. *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 296. There was sufficient evidence to support the finding of the jury that the company ratified the action of its president in executing the bond, and that finding is decisive of the case.

Exceptions overruled.

THOMAS F. KEOUGH vs. GEORGE GRIME.

Bristol. October 24, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Prohibition — Insolvent Debtor — Discharge in Insolvency.

The Pub. Sts. c. 157, § 88, which provide that an insolvent debtor who obtains a discharge in insolvency shall "be forever thereafter discharged and exempt from arrest or imprisonment in any suit, or upon any proceeding for or on account of a debt or demand provable against his estate," include proceedings in which a debt so provable is joined with a separate cause of action accruing after the debtor obtains his discharge. If the creditor desires to arrest the debtor as a means of enforcing satisfaction for the later debt, he must not join it with a debt upon which the debtor is exempted from arrest, or merge it in one judgment with such a debt.

PETITION, for a writ of prohibition, filed December 10, 1897. The respondent filed a motion to dismiss the petition, and demurred thereto.

At the hearing, before *Morton, J.*, there was evidence tending to show that on or about September 10, 1897, the Wilbur Shoe Company, a foreign corporation, obtained a judgment in an action of contract against the petitioner in the amount of \$274.57; that prior to the rendering of the judgment the petitioner was declared an insolvent debtor by the Court of Insolvency on December 11, 1896, and obtained his discharge in composition on March 25, 1897; that of the amount included in the judgment, \$244.26 was for merchandise and interest, sold by and accruing to the Wilbur Shoe Company prior to the first publication of the notice of the issuing of the warrant in the insolvency proceedings, \$24.57 was for merchandise sold by the Wilbur Shoe Company since July 26, 1897, and \$5.74 was for costs; that this judgment was obtained in the Second District Court of Bristol; that that court issued a notice under Pub. Sts. c. 162, § 19; that the petitioner appeared in court and was examined, and that the case on the examination was submitted to the respondent, the special and acting justice of said court; that the petition for the certificate authorizing the arrest of the petitioner was based on the grounds specified in Pub. Sts. c. 162, § 17, cl. 1;

that the petitioner contended that he could not be arrested upon the judgment; that the respondent herein found that the petitioner had certain personal estate which could not be taken on execution, and ordered the petitioner to convey to the Wilbur Shoe Company the said property, which could not be taken on execution under a conveyance; and that the petitioner refused to make the conveyance, and thereupon the respondent intimated and said that he would issue a certificate authorizing the arrest of the petitioner, and would order his arrest.

The prayer was for a writ prohibiting the respondent from proceeding further in the hearing of the petition of the Wilbur Shoe Company for the petitioner's arrest, and from ordering his arrest or from issuing a certificate therefor, and prohibiting the respondent pending the hearing from acting further in the proceedings. The order was that a writ of prohibition should issue. The defendant appealed to the full court.

A. S. Phillips, (W. E. Fuller with him,) for the respondent.

C. R. Cummings, (J. W. Cummings with him,) for the petitioner.

BARKER, J. We are of opinion that the provision of Pub. Sts. c. 157, § 83, which provides that an insolvent debtor who obtains a discharge in insolvency shall "be forever thereafter discharged and exempt from arrest or imprisonment in any suit, or upon any proceeding for or on account of a debt or demand provable against his estate," includes proceedings in which a debt so provable is joined with a separate cause of action accruing after the debtor obtains his discharge. If the creditor desires to arrest the debtor as a means of enforcing satisfaction for the later debt, he must not join it with a debt upon which the debtor is exempted from arrest, or merge it in one judgment with such a debt.

As it now appears that the execution on which the respondent intimated that he would order the petitioner's arrest was in fact a proceeding to enforce a judgment founded in part upon a demand provable in insolvency against the petitioner's estate in the proceedings in which he had obtained his discharge, it is immaterial whether that fact had been made to appear to the respondent. Nor does that question appear to have been raised before the single justice, or to be open upon the appeal.

Order, that writ of prohibition shall issue, affirmed.

ANNIE E. ADAMS vs. CAROLINE F. SWIFT & another.

Bristol. October 25, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Parent and Child — Negligence — Action — Law and Fact — Evidence — Question for Jury.

A woman and her daughter were invited to join a party upon an excursion, and the former accepted the invitation on condition that she might pay one half the cost of the carriage, and made such payment. The party, consisting of four persons, occupied a two-seated carriage drawn by two spirited horses. The daughter, who was nineteen years old and of slight build, and had had very little experience in driving, was allowed to drive the horses. In returning from the excursion the carriage formed part of a long procession of carriages, and upon reaching a level stretch after coming down an incline in the road, the pole of the carriage entered the back of a carriage in front of it and injured a person therein. A by-stander, who knew the mother and daughter, called out to them, "What are you trying to do?" The daughter replied, "Well, I can't hold them," and the mother said, "She's all right." Subsequently the mother tried to conceal from the injured person the identity of the occupants of the carriage. Held, in an action against the mother and daughter for the injury, that the question of the mother's liability was rightly submitted to the jury; and that the evidence of the admissions was also for the jury.

TORT, against Caroline F. Swift and Helen L. Swift, for personal injuries occasioned to the plaintiff by a collision between the carriages in which the respective parties were riding on August 15, 1894, upon a road leading from New London to Sunapee in New Hampshire. Trial in the Superior Court, before *Richardson, J.*, who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that the defendant, Helen L. Swift, a minor nineteen years of age, was stopping with her mother, the other defendant, at a hotel in Sunapee, and her father was then at his home in New Bedford; that the defendants and one Mrs. Page were invited by one Borden to drive with him from Sunapee to New London to witness a coaching parade; that Helen L. Swift accepted the invitation unconditionally, and Caroline F. Swift accepted it upon condition that she should be permitted to reimburse Borden for one half the cost of the carriage, which sum she paid; that Helen L. Swift drove the team from Sunapee up to and at the time of the collision;

that upon the return from New London to Sunapee, the plaintiff was driving in a buggy with her husband directly in front of the carriage occupied by the defendants, which latter was a two-seated surrey drawn by two spirited horses; that Borden and Helen L. Swift were upon the front seat and Caroline F. Swift and Mrs. Page were upon the back seat; that the carriages of the plaintiff and the defendants formed part of a procession on the road of seventy-five or one hundred carriages returning home, being in line close together, except that the actual distance between the defendants' carriage and that next in the rear did not appear, and they maintained their relative positions substantially in the line until the accident; that just prior to the accident the attention of the plaintiff and her husband was drawn to the carriage in which the defendants were driving, at which time it was coming down the end of an incline in the road to a level stretch upon which the plaintiff's buggy had just entered; that all the carriages came down the incline upon a slow trot, and just as the plaintiff's buggy entered upon the level the end of the pole of the carriage in which the defendants were driving — which at the time the attention of the plaintiff was drawn to it was not more than eight feet distant from the back of the plaintiff's buggy — came in contact with the back of the plaintiff's buggy and made a dent in the leather, which was followed by a second collision, the pole of the carriage in which the defendants were driving coming in contact with the plaintiff's back, and causing the injury complained of.

The defendants contended that there was but one collision, the first above named, occasioned by the sudden and unwarranted slowing down of the plaintiff's buggy, which under the circumstances was a want of due care, and was a contributing cause of the injury; the plaintiff contending that there was no material slowing down of the speed of the plaintiff's buggy, and that the injury complained of was due to the carelessness of the driver of the defendants' carriage.

Helen L. Swift testified that at the time of the accident she weighed 108 pounds; and that she had driven a one horse team before, and thought she had driven a pair of horses, but had never driven on New Hampshire roads before; and both she and Borden testified that Caroline F. Swift had nothing to say

about who should drive, and exercised no control of the excursion nor gave any direction as to the management of the team.

Mrs. Griggs, a witness for the plaintiff, testified that she was seated in her carriage at the side of the road at the time of the accident, and was acquainted with the defendants, and witnessed the collision; that she called out to the occupants of the defendants' carriage, "Well, what are you trying to do?" and that Helen L. Swift replied, "Well, I can't hold them," and Caroline F. Swift said, "She's all right."

There was evidence tending to show that the plaintiff had endeavored unsuccessfully to find out who were the occupants of the carriage in which the defendants were at the time of the accident, and did not discover until long afterwards; that this was known to the defendant Caroline F. Swift; and that while the plaintiff was endeavoring to ascertain the identity of the parties, Caroline F. Swift asked Mrs. Griggs not to mention it, and said to her, "Let them find out as best as they can." There was no other evidence relating to Caroline F. Swift.

The defendant Caroline F. Swift asked the judge to rule that there was no evidence of any negligence upon her part, or on the part of any person for whose acts or omissions she was legally responsible, and that the verdict on the evidence must be for her.

The judge refused to rule as requested, against the defendants' exception, and ruled as follows:

"Now then in regard to the responsibility of the mother. If they were going on that excursion or that ride that afternoon by the procurement of the mother, if she was interested in it, if she paid part of the expenses, if she was interested in it as one of the party, and she allowed the daughter to drive, if it was her excursion in part, and she allowed her daughter, who was then under age, to drive as the driver of the team which she was in, and in which she was interested, and to that extent possibly acting as her servant, or as her agent for that purpose there and then, if that were the state of things, then I imagine that the mother would be liable, if in other respects she is liable; that is, if she contributed to the hiring of the carriage, and allowed or let the daughter drive for her in such case, so that the driving was a driving for her as well as others, and the carriage was driven without due care by the daughter, then I think the

mother would be responsible in that situation of things. If nothing had appeared in the case at all, as has been stated to you, except that Mr. Borden had hired the carriage, and the mother had not contributed, she was not interested in the excursion or in the carriage, did not hire them or did nothing about them, and accepted an invitation to ride solely, and had been driven by anybody else except the daughter, she would not be liable. . . . But the team was driven by the daughter, and the mother was present, and it may be you would find that the driving was countenanced or allowed by the mother; and if with that the mother was interested in it, and paid for the team and hired the team in part, why then I think that the mother would be liable under those circumstances, if, I mean, she is liable in other respects, that is, if there was negligence on the part of the daughter."

The jury returned a general verdict for the plaintiff; and the defendant Caroline F. Swift alleged exceptions.

W. Clifford, for Caroline F. Swift, submitted the case on a brief.

L. LeB. Holmes, for the plaintiff.

BARKER, J. The evidence justified a finding that the excursion was a joint undertaking, of which Caroline F. Swift, the mother of the young woman who was driving when the accident happened, was an equal promoter and manager, and not a mere guest; and that under her control and direction her daughter, so inexperienced a whip that it might be negligence to allow her to drive upon such an occasion, was driving, and driving carelessly. Therefore the case was for the jury.

The evidence of admissions was for the jury, and the rulings were right.

Exceptions overruled.

WILLIAM D. WASHBURN vs. INHABITANTS OF EASTON.

Bristol. October 25, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

*Shade Trees located in Highway by Road Commissioners — Personal Injuries —
Question for Jury.*

Where, in an action for personal injuries occasioned to the plaintiff by collision with shade trees on a public highway, it is not contended that the accident was due to any defect in the trees themselves, and there is nothing to show that there has been any change since the road commissioners located the trees, the law declares that they do not incommode or endanger the public travel, and this decision cannot be revised by a jury.

TORT, for personal injuries occasioned to the plaintiff in November, 1897, while driving along a public highway in the defendant town by colliding with shade trees set out by order of the road commissioners,

Trial in the Superior Court, before *Hopkins, J.*, who, at the request of the defendant, ruled that, upon all the evidence, the plaintiff was not entitled to maintain the action, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

F. S. Hall, for the plaintiff.

H. J. Fuller, for the defendant.

HAMMOND, J. The plaintiff, while travelling in his team in a southerly direction on the highway, overtook another team, and while he was attempting to pass it on the left his carriage came in contact with some shade trees, and he was hurt. These trees were in a line substantially parallel with the easterly wall of the highway, and about six feet distant therefrom, and were in the shoulder of the part of the road which was worked for travel, and distant easterly from such part two feet and nine inches. The trees had been set out about ten years before, under Pub. Sts. c. 54, § 6, by the road commissioners of the town, who had charge of all matters pertaining to shade trees. The road was about forty feet wide between the walls, and the part worked for travel near the place of the accident was about thirteen or fourteen feet wide. On the west side of the road at

the place of the accident there was a level space of about three feet covered with grass to the shoulder of the road, and from there was a gradual descent to the westerly wall; from the westerly shoulder of the road to the wall, the ground was not very even, and some low brush and cobble stones were there. It was not claimed that the trees were in a dangerous or decayed condition, or that they endangered or hindered public travel in any way except by their location. It did not appear that any complaint about the trees ever had been made to the commissioners, or that these officers had ever made any adjudication as to whether the trees were a nuisance to public travel, except such as may be implied from the fact that the trees were set out by their order, and in the place directed by one of their number.

The extent to which the duty imposed by statute upon towns and cities to keep the streets reasonably safe and convenient for travellers thereon is modified by the fact that the objects complained of have been placed within the limits of the street by public authority has been heretofore somewhat considered by the court. In *Young v. Yarmouth*, 9 Gray, 386, it was decided that a town was not liable for damages sustained by a traveller upon a highway by reason of a telegraph post erected within the limits of the highway by an electric telegraph company, in a place prescribed by the selectmen of the town, under St. 1849, c. 93, § 3. Section 2 of that statute authorized any electric telegraph company to erect posts upon and along any highway, provided the posts did not incommode the use of the highway. Section 3 made it the duty of selectmen of a town or the mayor and aldermen of a city to give the company their writing specifying where the posts may be located, and the kind and height of the same, and it was further provided that after the erection of the posts the selectmen should have the power to direct any alteration in the location. The trial court instructed the jury, that, "if they were satisfied that the telegraph post complained of was an obstruction, rendering the highway dangerous and unsafe for the purposes of ordinary travel, it would be such a defect in the highway as would render the town liable to any one injured thereby." This court held this instruction erroneous, and Mr. Justice Dewey, after stating that

the selectmen do not act in this matter as the agents of the town, but as public officers, and that there is no appeal, goes on to say: "The consequence of this necessarily must be that the location of the telegraph posts by the selectmen is conclusive upon all parties. The town cannot interfere and remove them; and their existence upon the highway, if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway, for which the town can be held responsible in case of any injury thereby occasioned to any person travelling on such highway. If an improper location of telegraph posts has been allowed by the selectmen, the power is fully vested in the selectmen of the town to direct an alteration in such location, and thus obviate any inconveniences that may be found to exist to the traveller or the public generally. But this is not a matter which the town in its corporate capacity can regulate, or for which the town is responsible."

In *Commonwealth v. Boston*, 97 Mass. 555, which was an indictment for suffering a highway to be encumbered by posts erected under substantially the same statute as re-enacted in Gen. Sts. c. 64, §§ 2, 3, it was said by the court: "And it seems impossible to conclude that the Legislature, when they gave to a board of public officers the power and duty to direct the places in highways which should be occupied by telegraph poles, and required that their orders should be placed on record, could have intended to leave the existence and continuance of the poles at the places designated to the revision and control of a highway surveyor, or to the discretion of any jury before whom the question might come upon an indictment or action." And also: "It is not according to the usual policy of the law to commit to one tribunal in advance the decision of a simple question of fact, and leave it just as much open to controversy afterwards."

The same principle was applied where watering troughs were maintained under St. 1872, c. 84. *Cushing v. Bedford*, 125 Mass. 526.

As was stated by Mr. Justice Morton, in *Johnson v. Salem Turnpike*, 109 Mass. 522, 526, "In such cases the liability of towns depends upon the test whether they have the power, and

it is their duty, to remove the obstruction and put the highway in a safe condition."

In the case now before us it is conceded by both parties that the trees were set out about ten years prior to the accident, by order of the road commissioners, acting under Pub. Sts. c. 54, § 6, and that the provisions of § 10 of that chapter and of St. 1885, c. 123, are applicable to them. These statutes in substance provide that "the . . . road commissioners . . . of a . . . town to whom the care of the . . . roads may be intrusted, may authorize the planting of shade trees therein wherever it will not interfere with the public travel or with private rights," and trees so planted "shall not be deemed a nuisance; but upon complaint made to the . . . road commissioners, they may cause such trees to be removed, . . . if the public necessity seems to them so to require." Pub. Sts. c. 54, § 6. Section 10 of the same chapter and St. 1885, c. 123, forbid the removal of such trees except as therein authorized.

These statutes have been considered by this court in two recent decisions. In *Chase v. Lowell*, 149 Mass. 85, it was said that the question whether such a tree incommodes or endangers travellers and should be removed is to be determined, not by the summary discretion of a highway surveyor or by a vote of the town, but by the adjudication of a tribunal designated by the statute; and in the same case it was also said, "We think that the statute limits the duty of the surveyor of highways in such a case to procuring an adjudication that the tree is dangerous and shall be removed, and, until it shall be so removed, to taking due precautions against the danger."

This cause came again to this court, (*Chase v. Lowell*, 151 Mass. 422,) and it then appeared that the shade tree had become decayed, and that it was blown over upon the plaintiff, a traveller in the highway. The evidence warranted a finding that it had been in a decayed condition so long a time that the persons having charge of the streets ought to have known of it; and the plaintiff recovered. It was said by Mr. Justice Knowlton, in giving the opinion, that if such "a tree standing in the highway is in danger of falling, the authorities whose duty it is to keep the way safe and convenient for travellers should do what they reasonably can to protect the public from it."

In the light of these and similar decisions we think that, so far as material to the present case, the law relating to the liability of towns and cities under Pub. Sts. c. 52, for injuries to travellers by reason of shade trees set out under Pub. Sts. c. 54, § 6, may be stated as follows.

1. The question whether a shade tree so set out is by reason of its locality dangerous to public travel, and for that reason should be removed, is a question over which the town has no control, but it is to be decided by the public tribunal duly appointed for that purpose, (in this case the road commissioners,) and the decision is not subject to review by a jury.

2. This decision when made is until changed to be assumed as correct under the circumstances existing at the time it was made, and is to be taken as the authoritative declaration of the law that the tree so set out under such circumstances is not dangerous to public travel simply by reason of its locality; and in the absence of any subsequent physical change in the road, or in some other material respect, the town is justified in assuming that there is no duty to apply for a change in the decision. But should there be any such subsequent material change, the questions whether the tree is thereby made dangerous, and whether it is the duty of the town to provide against such danger, either by application for a change in the location, or otherwise, may be submitted to a jury.

3. The question decided by the public authorities under the statute being whether the public travel is incommoded or endangered by the locality of the tree in a natural healthy state, and not whether the tree is dangerous by reason of its decayed condition and consequent liability to fall, the questions whether a tree is dangerous from such a liability, and whether the town has used due care to protect the public travel from it when thus dangerous, are always questions which may be submitted to a jury.

In this case there is nothing to show that there has been any change since the road commissioners located the trees. The law has therefore declared that, under the circumstances existing at the time of the accident, they did not incommode or endanger the public travel, and this decision cannot be revised by a jury. It is not contended that the accident was due to any defect in the trees themselves.

Exceptions overruled.

MARY MARLEY vs. ABBY S. WHEELWRIGHT.

Bristol. October 25, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Landlord and Tenant — Negligence — Action.

Where the owner of a building let to a tenant, who sublets a portion of it, agrees to make the outside repairs, he is not liable to an action for personal injuries caused to a member of the subtenant's family by a want of repair in an outside stairway, if he has had no notice of such want of repair.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Trial in the Superior Court, before *Hopkins, J.*, who allowed a bill of exceptions, in substance as follows.

The defendant leased an entire building in Taunton, which consisted of two stores in the lower story and two tenements in the upper story, to one Pierce, who orally let the tenement in the front of the upper story to the plaintiff's son, with whom she lived. The rear tenement was let to another person. In the rear of the building on the outside was an uncovered wooden stairway consisting of fourteen steps. This was the only entrance of the rear tenement, and was the only means of access to and egress from the plaintiff's tenement to the yard below, where the outhouses, coal, and fuel boxes were. There was a front entrance or stairway leading from the plaintiff's tenement to the street, but from this entrance one could not get to the back yard without going on land of another person.

This house was one of the oldest houses in Taunton, and in the general condition of an old house, and the steps were in the same general condition.

When the tenement was let to the plaintiff's son by Pierce, there was evidence, not objected to by the defendant, tending to show that it was stated by Pierce that the defendant, the owner, had made a lease which was still in effect, in which it was stated that all the outside repairs of every kind and description were to be made by the owner, and all the interior repairs of the entire building were to be made by the lessee, Pierce; and no evidence

was offered by the defendant to contest this statement. The defendant was not present at the trial.

The lease was not produced, and no effort was made to account for its absence.

Certain inside repairs were mentioned as necessary by the plaintiff's son at the time of hiring, which were done by Pierce before the former took possession of the tenement.

On August 20, 1897, about four o'clock in the afternoon, the plaintiff went down in the back yard to the outhouses, and while returning with three or four sticks of kindling in one hand, and while mounting the steps, having hold of the rail which protected them with the other hand, fell when she got on to the seventh step, which broke or "slivered off." Pierce, the plaintiff, her son, and two other witnesses testified that it looked as if the breaking was because of dry rot, as the steps showed every indication such as a board subject to dry rot shows. There was no evidence introduced by the defendant to show that the plaintiff was not in the exercise of due care. The testimony of Pierce showed that the step looked to be rotten when he saw it the day after the accident. The plaintiff testified that the steps showed no outside indication of being dangerous, or rotten; that she was sixty-four years of age, and had lived in the tenement for about eight months at the time of the injury; that the steps were in substantially the same condition as when she first moved in; and that neither she nor her son had ever seen the defendant.

All the evidence showed that the steps were in the same condition when the accident to the plaintiff occurred in which they were when the plaintiff's son hired the tenement.

There was no dispute but that the break in the step was of the projecting part of the tread, that it "slivered off" about three fourths of the length of the whole tread, and that the rest of the step was not broken.

The evidence was uncontradicted that the plaintiff used the stairs many times a day while she lived in this tenement; that no complaint was made by the plaintiff or her son about the stairs during their tenancy; and that so far as outward appearance went there was nothing unsafe about the stairs, except in so far as the age of the stairs indicated such a condition.

The judge, at the request of the defendant, ruled that, upon all the evidence, the plaintiff was not entitled to maintain the action, and directed the jury to return a verdict for the defendant.

The plaintiff alleged exceptions.

R. P. Coughlin, for the plaintiff.

F. S. Hall, for the defendant.

HAMMOND, J. The plaintiff had lived for eight months before the injury with her son in the tenement hired by the latter from one Pierce, who during all that time was, and for some time before had been, the tenant of the whole premises of which this tenement was a part, having a lease of the same from the defendant. The entire premises thus let to Pierce by the defendant comprised an old building with two stores in the lower story, and two tenements in the upper story, one of which the plaintiff's son occupied.

It thus appears that the defendant was no longer in control of the stairway. It had been included in the lease to Pierce, and the rule stated in *Looney v. McLean*, 129 Mass. 33, and in several other cases, concerning the liability of a landlord who retains control over a staircase over which his tenants have a right to pass in common is not applicable.

The owner who has let the entire premises, staircases and all, has parted with his control, and is therefore free from this duty of due care as between him and his tenant or any subtenant. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472. There is no implied warranty that a house is safe and fit for habitation, nor in the absence of any agreement otherwise providing is the landlord under any obligation to make repairs. *Looney v. McLean*, 129 Mass. 33. *Watkins v. Goodhall*, 138 Mass. 533, 536. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472.

The bill of exceptions recites that, "When the tenement was let to the plaintiff's son by Pierce, there was evidence, not objected to by the defendant, tending to show that it was stated by Pierce that the defendant, the owner, had made a lease which was still in effect, in which it was stated that all the outside repairs of every kind and description were to be made by the owner, and all the interior repairs of the entire building were to be made by the lessee Pierce; and no evidence was offered by

the defendant to contest this statement. The defendant was not present at the trial." If this is to be taken as sufficient proof, the defendant not objecting, that the defendant had agreed with Pierce that she would make the outside repairs, it must be implied under the circumstances of this case that she was to make such repairs only upon reasonable notice. *Hutchinson v. Cummings*, 156 Mass. 329. *McLean v. Fiske Wharf & Warehouse Co.*, *ubi supra*. *Gerzebek v. Redmond*, 4 Vroom, 240. See also 7 Am. & Eng. Encyc. of Law, 24, for collection of authorities. The mere want of repair, therefore, shows no such negligence as will support an action of tort in favor of Pierce, or any subtenant of his, for injury caused by an accident due to the want of repair. Neither the plaintiff nor her son made any complaint, nor does it appear that Pierce ever did, nor that the defendant knew the condition of the steps. Therefore, no negligence on the part of the defendant is shown. She was not in default as between her and her tenant, or any subtenant of his, until after notice.

Exceptions overruled.

MICHAEL R. DALEY vs. PEOPLE'S BUILDING, LOAN, AND SAVINGS ASSOCIATION.

Bristol. October 26, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Corporation — Covenant — Evidence.

A corporation issued a certificate that a person was a shareholder therein, containing a covenant to pay him one hundred dollars a share, five years from date, and stating that the sum was "payable in the manner and upon the conditions set forth in the articles of association and by-laws and terms and conditions printed" thereon. The statute of incorporation stated the final purpose of the corporation to be that "of accumulating a fund to be returned to its members . . . when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association," one of which provided that "whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be cancelled," and he "shall be entitled to receive . . . the par value of the shares named, . . . and no more." *Held*, in an action upon the covenant, that the covenant was not absolute, and that evidence that there were withdrawals of other members on file, that the corporation had suffered losses since the certificate was issued, and that the directors had taken steps to reduce the assets, was admissible.

CONTRACT, upon a covenant contained in a certificate issued by the defendant corporation to the plaintiff. At the trial in the Superior Court, before *Hopkins, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

C. M. Elliott of New York, (*H. L. Phillips* with him,) for the defendant.

C. R. Cummings, (*E. Higginson* with him,) for the plaintiff.

HOLMES, J. This is an action upon a covenant to pay one hundred dollars a share, five years from date, contained in a certificate that the plaintiff is a shareholder in the defendant corporation. At the trial the defendant offered evidence that there were withdrawals of other members on file, that the corporation had suffered losses since the certificate was issued, and that the directors had taken steps to reduce the assets, the object being, of course, to show that the corporation had not funds applicable to the payment of the alleged debt. The evidence was rejected. The defendant also moved for a nonsuit, on the ground that by the conditions of the contract any action brought by a shareholder was required to be brought in the county of Ontario, in the State of New York. This was refused. The plaintiff had a verdict, and the case is here on exceptions.

As we understand that a decision upon the first point mentioned is likely to dispose of the case, we shall confine ourselves to that, and shall not decide the second, although, if we were prepared to assent to the defendant's contention without further consideration, it would be logical to dismiss the plaintiff to New York. Compare *Nute v. Hamilton Ins. Co.* 6 Gray, 174, 179, 184, with *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28.

With regard to the evidence offered, the plaintiff takes the preliminary objection that it does not appear what the defendant expected to prove. *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 169. But the rule referred to is a rule of substance, not of form. There must be reasonable ground to believe that the excepting party has been harmed by the exclusion of a question, but there need not be a formal tender of proof. In this case, the series of questions put and excluded showed the defendant's purpose and expectation so clearly that it would be unjust not to deal with the offer of evidence on its merits.

On the merits the plaintiff's position is that he has an absolute covenant, and that that is the end of the matter. But we are of opinion that the case cannot be disposed of so simply. By the express words of the certificate, the sums promised are "payable in the manner and upon the conditions set forth in the articles of association and by-laws and terms and conditions printed on the back of this certificate." By the law and without express words the contract is subject to the statute under which the defendant is incorporated, and will be construed with reference to it. *Hutchins v. New England Coal Mining Co.* 4 Allen, 580, 582. *Thomp. Corp.* §§ 1136, 1137. The exceptions state that this statute was put in evidence, and we assume that it was intended that we should refer to it.

Upon looking at the statute, Laws of New York, 1851, c. 122, § 1, we find that the final purpose of such association is stated to be that "of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association." See also § 7. The seventeenth article of association provides that "Whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be cancelled" and the shareholder "shall be entitled to receive . . . the par value of the shares named, . . . and no more." The sum specified in the covenant is the par value of the shares, and, considering that the covenant is made with a shareholder, we think it tolerably plain that it must be read as subject to the implication of the statute and the articles, and must be taken as binding the corporation only to the extent of the funds accumulated and available by the articles for the cancellation of unredeemed shares.

The interpretation which we adopt would have strong reasons in its favor, even if we did not have the words of the act before us, — perhaps in view of the nature of the corporation (*Brett v. Monarch Investment Building Society*, [1894] 1 Q. B. 367, 370) even stronger reasons than those which induce courts generally to limit a guaranty of dividends by a corporation to profits. *Field v. Lamson & Goodnow Manuf. Co.* 162 Mass. 388, 393, and cases cited. And the ground for the last mentioned decis-

ions extends further than the mere use of the word "dividends," which has not prevented an undertaking specially authorized by statute being construed as absolute. *Williams v. Parker*, 136 Mass. 204. But in the case at bar, to quote the language of a decision of the Supreme Court of New York upon the point which we are considering, and with regard to the same corporation, "The authority to issue a certificate with a fixed period of maturity is not expressly given either by the statute or by the articles of association or by-laws of the association. We are of the opinion that the defendant did not possess the power or authority to issue a certificate specifying a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity." *O'Malley v. People's Building, Loan, & Savings Association*, 92 Hun, 572, 577. See *Engelhardt v. Fifth Ward Permanent Dime Saving & Loan Association*, 148 N. Y. 281; *Heinbokel v. National Savings, Loan, & Building Association*, 58 Minn. 340; *Texas Homestead Building & Loan Association v. Kerr*, 13 S. W. Rep. 1020.

The view which we take makes it unnecessary to consider whether the plaintiff was affected by the later changes in the articles of association and by-laws.

Exceptions sustained.

GEORGE L. TYLER vs. IDEAL BENEFIT ASSOCIATION."

Essex. November 1, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Disability Insurance — Application — Misrepresentation — Action.

In an action upon a policy of insurance against disability, the sole defence being that the plaintiff omitted to state in his application for insurance the fact that about fifteen years before he had sprained his left ankle, so that he applied to it some liniment and it troubled him for three or four hours, although the defendant's examining physician testified that a sprain never fully recovers, that such an injury to one leg would make an injury to the other leg more probable fifteen years afterwards, and that, if the insurer had been informed of the previous sprain it would not have written a policy covering injuries to the ankle,

it is competent for the judge, sitting without a jury, to find that the plaintiff's omission to state the previous sprain was not a misrepresentation which increased the risk of loss; and evidence that the plaintiff did state the fact of the former sprain to the agent who assisted him in making out his application, and did not put it in the application because the agent said it was too trifling and so did not write it down, would further justify a finding that the omission was not made with actual intent to deceive.

CONTRACT, upon a policy of insurance or certificate of membership issued by the defendant to the plaintiff on August 5, 1896, entitling him to a certain sum per week for total disability.

At the trial in the Superior Court, before *Richardson, J.*, without a jury, the defendant asked the judge to rule that, upon the whole case, the plaintiff could not maintain his action, and also on account of knowingly concealing a previous injury in his application for insurance; and to find for the defendant. The judge declined to rule as requested, and found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

D. W. Quill, for the defendant.

F. E. Farnham, for the plaintiff.

BARKER, J. The sole defence relied upon at the trial was that the plaintiff omitted to state in his application for insurance the fact that some fifteen years before he had sprained his left ankle, so that he applied to it some liniment and it troubled him for three or four hours. Notwithstanding the testimony of the defendant's examining physician to the effect that a sprain never fully recovers, that such an injury to one leg would make an injury to the other leg more probable fifteen years afterwards, and that if the insurer had been informed of the previous sprain it would not have written a policy covering injuries to the ankle, we think it was competent for the court to find as a fact that the omission of the plaintiff to state the previous sprain was not a misrepresentation which increased the risk of loss. The evidence that the plaintiff did in fact state the circumstance of the former sprain to the agent who assisted him in making out his application, and did not put it in the application because the agent said it was too trifling, and so did not write it down, would further justify a finding that the omission or misrepresentation was not made with actual intent to deceive. The rights of the parties are governed by the provisions of St. 1895, c. 281, relative

to misrepresentations in applications for membership in fraternal beneficiary corporations, and under those provisions the court was justified upon the evidence in refusing the defendant's requests, and in finding for the plaintiff.

Exceptions overruled.

ROBERT B. SMITH vs. GEORGE R. JAGOE.

Essex. November 1, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, LATHROP, BARKER, & HAMMOND, JJ.

Replevin — Exceptions — Mortgage — Material Alteration — Evidence.

It is incumbent upon the excepting party to show by his bill of exceptions that the rulings excepted to were wrong, and, further, that he was harmed by the error. The contention that questions admitted under objection were leading in form is not open on a bill of exceptions which does not show that the questions were objected to for form.

In an action of replevin, if the defendant relies upon a mortgage which has been assigned to him, and which was drafted by the use of a printed form containing blanks, and the plaintiff contends that there has been a material alteration of the mortgage since he signed it, by writing the names of several articles in the blank to be filled with the description of the property, evidence of the plaintiff's expectation as to how the blanks were to be filled by the mortgagee, to whom the mortgage after being signed was intrusted for that purpose, may be competent.

REPLEVIN of certain articles of personal property. At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

I. B. Keith, for the defendant.

W. H. Niles, for the plaintiff.

BARKER, J. The action is replevin, and the plaintiff was required to show that he had the right to the possession of the property taken upon the writ. He was the general owner of the property, and the defendant relied upon a mortgage which purported to have been made by the plaintiff to one Moody, who had assigned it to the defendant. The course of the trial is not very clearly disclosed by the bill of exceptions. It is stated that the plaintiff made a *prima facie* case and rested. It would

seem that in putting in his defence the defendant introduced in evidence the mortgage and the assignment of the same to himself, and testified that after he had received the assignment he gave the plaintiff written notice that he owned the mortgage, and that thereafter the plaintiff paid interest upon it at four different times, for which payments he took receipts, which were produced by the plaintiff, as we suppose. The mortgage seems to have been drafted upon a printed form containing blanks. The blank to be filled with the description of the mortgaged property was followed by these printed words: "meaning hereby to convey to the said . . . all furniture of every description, useful and ornamental, beds, bedding, printed books, printed music, carpets, rugs, curtains and their fixtures, draperies, pictures, engravings, mirrors and their frames, statuary, works of art and ornament, plate and plated ware, china, glass, crockery, tin and iron ware, clocks, musical instruments, trunks and other travelling equipments, sporting goods, and each and every other article of personal property contained in . . . situated No . . . on said," etc.

The descriptive clause of the mortgage, as produced at the trial, contained before the printed words above stated the written words: "1st, One Norris upright piano, No. 5045; Plush parlor suit; Tap. Carpet; Cherry Centre Table; Hanging Lamp; Marble Clock; Mantel Mirror; Four Pictures; Range and ware; Crockery, glass and Silver plated ware"; and the first blank in the printed portion of the descriptive clause was filled with the name of the mortgagee, and the remaining blanks with words which designated the plaintiff's dwelling as the place in which the mortgaged property was contained.

The bill of exceptions does not state whether the defendant rested his case upon the production of the mortgage, his own testimony relating thereto, and the production of the four receipts given by him to the plaintiff for payments of interest made after notice of the assignment to the defendant. It does state that it was claimed by the plaintiff, and it seems a fair inference that this contention was made in that part of the trial commonly called the rebuttal, that there had been a material alteration of the mortgage since he signed it, and that the defendant knew of the alteration before the mortgage was assigned to

him, and the bill also states that the plaintiff, his wife, and the defendant all testified.

At the end of the trial four questions were submitted to the jury and answered by them, from which it appears that the jury found that there was an alteration of the mortgage after it was executed, the alteration consisting of the writing in of the words, "Plush parlor suit; Tap. Carpet; Cherry Centre Table; Hanging Lamp; Marble Clock; Mantel Mirror; Four Pictures; Range and ware; Crockery, glass and Silver plated ware"; that the plaintiff signed the mortgage in blank, with an understanding that Moody was to fill the blanks; and that Moody filled the blanks in violation of what was understood and agreed, that violation being the insertion of the words last quoted, and that the defendant had knowledge of this alteration before or at the time of the assignment to himself.

The bill of exceptions does not purport to contain any statement of instructions requested or given to the jury, and it is to be assumed that the questions which were submitted to the jury and answered were upon issues as to which the parties were contending at the trial, and that they were properly left to the jury and under correct rulings and instructions. The only question which the bill of exceptions presents for our decision is whether certain questions put to the plaintiff, when under direct examination as a witness, were improperly allowed, the defendant having objected to them, and saved his exception to their allowance. It was suggested by counsel at the argument that some of these questions were in fact put to the witness by the court, but it is not so stated in the bill, and we assume that they were asked by the plaintiff's counsel. The plaintiff seems to have testified, without objection, that he signed the mortgage and mortgage note in blank at his house, to which Moody brought them to be signed, and that there was no writing on the mortgage or the note when the plaintiff signed them, and that he did not read the printed matter because he was in a hurry. The bill of exceptions next states that the plaintiff was further questioned, under the defendant's objection and exception, and states at length sixteen questions and their answers, so that it appears that the only error which the defendant can urge to sustain his bill is the admission of these questions to the plaintiff.

It is to be noticed that, owing to the form of action and the previous course of the trial, the bill of exceptions does not enable us to know with certainty or precision just what contentions of the parties were actually upon trial when the questions excepted to were allowed to be put to the plaintiff, and it should also be observed that it is incumbent upon the excepting party to show by his bill of exceptions that the rulings excepted to were wrong, and further that he was harmed by the error.

His first contention is that the questions were leading in form. But the bill of exceptions does not show that the questions were objected to for form, and the contention is not now open to the defendant.

The substance of the testimony given by the plaintiff, in response to the questions admitted under exception, was that at the interview when the mortgage was signed in blank Moody said that he would have it filled out, and the plaintiff expected him to do so; that what was said as to what should be written in was said by Moody, and that it was that he had no claim on anything but one upright piano, and that while it was not said in explicit words that Moody might write in the words "one upright piano," the plaintiff expected him to write in words to make the mortgage cover a piano and nothing else; and further that the amount then due Moody was about thirty-five dollars, according to certain receipts.

When, as in the present instance, it is for a jury to determine first whether an instrument upon which the rights of the parties depend was in fact executed and delivered in blank, with the understanding and intention that the blanks should be filled up by the party to whom it was so delivered, and further whether that party has so exceeded the authority impliedly given him to fill out the blanks as to render the instrument void as against its maker, the situation of the parties, and all that was said at the time when the implied authority was given, are relevant and competent.

Furthermore, it is competent for one who holds or claims under a document so made and delivered to contend that one who has intrusted a blank document bearing his signature to another person with the expectation that the latter will fill the blanks is estopped from repudiating the insertion in the blanks

of anything which the signer of the instrument should have expected would be inserted, either by reason of the transaction itself of which the instrument was a step, or of the usual course of business with reference to such instruments. *White v. Duggan*, 140 Mass. 18. While the expectation of the grantor in a mortgage cannot be given in evidence to affect the construction of the language of the document, it may well be a material element in determining whether a fraud has been practised upon the maker of a mortgage delivered in blank by the filling of the blanks, and also in determining the further question whether the maker of such a mortgage is estopped from asserting that the blanks were improperly filled.

So far as the bill of exceptions enables us to understand the issues which were pending before the jury, we think that, in the attitude which the trial had then assumed, the evidence given under the defendant's exception was competent in some aspects of the case.

Exceptions overruled.

JOHN HENDERSON vs. GREENFIELD AND TURNER'S FALLS
STREET RAILWAY COMPANY.

Franklin. November 14, 1898. — February 28, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

*Personal Injuries — Negligence — Noise caused by Electric Car — Law
and Fact.*

In an action against a street railway company for personal injuries, it appeared that the plaintiff was thrown from a wagon in consequence of the horse attached thereto being frightened by the sounding of a gong on one of the defendant's cars, and by noise and sparks caused by the wheels of the car running over what the plaintiff believed to be pebble stones. The plaintiff testified that the horse was four or five yards from the car, and that the motorman rang the gong half a dozen or a dozen times. There was nothing to show that the noise and sparks were due to any defect in construction or negligence in operation, and up to the moment of the accident there was nothing in the behavior of the horse which rendered it negligence on the part of the motorman to ring the gong. *Held*, that the judge rightly directed a verdict for the defendant.

TORT, for personal injuries received by the plaintiff, by being thrown from a wagon while riding with one Moreau in the town

of Montague, on June 7, 1897. At the trial in the Superior Court, before *Richardson, J.*, there was evidence tending to show that the accident occurred on a public street, about fifty feet wide, known as Avenue A, and that the horse which Moreau was driving became frightened by the noise of the gong or bell on an electric car belonging to and operated by the defendant, and by the noise made by the wheels of the car, and the sparks coming from the wheels.

The plaintiff testified that they entered Avenue A near the southerly end; that he could see an electric car up near the other end of the avenue between a quarter and a half mile away at its starting place; that the railway track was in the centre of the avenue; that they drove up the avenue on the right hand side of the railroad track; that the horse was going at a regular gait; that one car which was ahead of another stopped on a cross-walk; that the horse approached the car, and the cars, as he thought, started quickly after a passenger alighted; that the horse, being four or five yards from the car, acted as though he were a little afraid and turned round quickly, all in an instant, but he did not seem to be afraid till the man on the car began ringing the gong; that then the horse shied, he having previously called out to the motorman to stop; that he had not time to call a second time when the horse turned round quickly, and threw him out on the curbstone; that the gong was rung half a dozen or a dozen times; that the appearance of the car was unusual; that it sounded as if the car were running over pebble stones or something on the track; and that it made a loud noise, and there was a little fire, a little light from the wheels, which he thought was caused by the pebble stones.

Moreau testified largely in corroboration of the testimony of the plaintiff.

The judge, at the request of the defendant, then directed a verdict for the defendant; and the plaintiff alleged exceptions.

B. H. Winn & L. W. Griswold, for the plaintiff.

D. Malone, for the defendant.

MORTON, J. The ruling was right. Up to the moment of the accident there was nothing in the behavior of the horse which rendered it negligent on the part of the motorman to ring the gong, and it cannot be said that to ring the gong on an electric

car in a public street half a dozen or a dozen times, which the plaintiff says was done, is of itself, without anything more, evidence of negligence. There was nothing to show that the noise and sparks were due to any defect in construction or negligence in operation.

Exceptions overruled.

DANIEL D. FORD vs. MOUNT TOM SULPHITE PULP COMPANY.

Hampshire. January 10, 11, 1899. — February 28, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Master and Servant — Dangerous Machine —
Action — Evidence.*

A workman, who was on a platform three feet lower than a revolving shaft, which was about thirteen feet from the floor, trying to throw a belt off a pulley at the end of it, on the other side of the bearing and one foot distant from a set screw fastening a collar near the end of the shaft, was caught by the screw and injured. The screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room and oiled the shaft and bearing, he never had seen this screw. There were other similar screws in the place, and there was not much light. *Held*, that he could not maintain an action against his employer for his injury, either at common law or under the employers' liability act, St. 1887, c. 270.

In an action for personal injuries caused by being caught by a set screw fastening a collar near the end of a revolving shaft, the question "whether or not it is customary in factories to have a collar with a projecting set screw placed near a pulley, where it is necessary for a person to go frequently to do something with reference to putting on a belt," is properly excluded.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. The declaration contained a count under the employers' liability act, St. 1887, c. 270, and a count at common law. Trial in the Superior Court, before Dewey, J., who directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was right, judgment was to be entered for the defendant; otherwise, the verdict was to be set aside, and a new trial granted. The facts appear in the opinion.

J. B. O'Donnell, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

HOLMES, J. This is an action by one of the defendant's workmen, brought under the statute and at common law, for personal injuries caused by being caught by a set screw fastening a collar near the end of a revolving shaft. According to the evidence for the plaintiff, the set screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room and oiled the shaft and bearing, he never had seen this screw. It seems not to have been disputed that there were other similar set screws in the place. The shaft referred to was about thirteen feet from the floor, and at the time of the accident the plaintiff was on a platform three feet lower than the shaft, trying to throw a belt off a pulley at the end of it, on the other side of the bearing and one foot distant from the set screw. There was not much light. The presiding judge took the case from the jury, and it is here on report.

We are of opinion that the ruling was right, and that the case cannot be distinguished satisfactorily from the numerous other cases in this Commonwealth already decided concerning set screws. *Donahue v. Washburn & Moen Manuf. Co.* 169 Mass. 574, and cases cited. This case shows that a few years ago a set screw was a common device. There is no evidence that it has ceased to be one. In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 267, a case very like the present, it was said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." See also *Hale v. Cheney*, 159 Mass. 268, 271. In *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 158, it was held that an employer did not need to warn an adult workman of the presence and dangers of a set screw when employing him. As has been said or implied in other cases, where the danger is obvious and great, as in the case of a revolving shaft, it is not necessary to give warning of elements which merely enhance the risk. *Carey v. Boston & Maine Railroad*, 158 Mass. 228, 231. See also *Keats v. National Heeling Machine Co.* 65 Fed. Rep. 940. The same considerations apply to the subsequent introduction of a set

screw when, as here, there is no pretence that the plaintiff remembered the alleged previous condition of the shaft and was acting in reliance upon his former observation, and when, further, it was the plaintiff's especial business to take charge of the machinery, and therefore to inform himself of its construction.

The question "whether or not it is customary in factories to have a collar with a projecting set screw placed near a pulley, where it is necessary for a person to go frequently to do something with reference to putting on a belt," etc., was properly excluded. See *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153, 161. The question in this highly specific form, supposing it to admit of an honest answer, must have been intended to furnish a pattern upon which the jury were to model the defendant's duty, and it was at least within the discretion of the judge to exclude evidence directed to that point. It would have been admissible, no doubt, to show that set screws were going out of use, and no longer were to be expected or looked out for without special warning. But that was not what the evidence meant.

Judgment for the defendant.



ROBERT A. KNIGHT vs. SIMON ROTHSCHILD & another.

Hampden. January 20, 1899. — February 28, 1899.

Present: HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Insolvent Debtor — Fraudulent Conveyance — Evidence — Affidavit.

In an action by an assignee in insolvency to recover the value of a quantity of garments alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, a person who had been employed in the insolvent's store for six years and knew the cost and selling price of all garments that came into the store during that period and also the fair value of such goods, and a part of whose business it was to sell them to customers, and who saw all the garments taken away by the defendant, is rightly allowed to testify to the value of such garments.

The affidavit of the defendant in an action by an assignee in insolvency to recover the value of goods alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, and that of his attorney, filed in an action in another State brought by the present defendant against the insolvent, in which affidavit the defendant states that he was present at an interview referred

to in his attorney's affidavit, that he knew the contents of that affidavit, and that the statements therein were true, are rightly admitted in evidence; and the affidavit of the defendant's agent, filed in the same case in the other State, which tends to contradict some parts of his testimony in the present case which are unfavorable to the plaintiff, who called him as a witness, is also competent.

TORT, by the assignee in insolvency of the estate of James McKeon, to recover the value of a quantity of fur garments alleged to have been conveyed by McKeon to the defendants in fraud of the insolvency laws. At the trial in the Superior Court, before *Lilley*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

C. C. Spellman & C. F. Spellman, for the defendants.

H. W. King & C. M. Rice, (*R. A. Knight* with them,) for the plaintiff.

KNOWLTON, J. The only exceptions that were argued in this case were to the admission of evidence against the defendants' objection.

1. The witness Dietz was rightly allowed to testify to the value of the fur garments taken away by the defendants. She had been employed in McKeon's store for six years, and knew the cost and selling price of all garments that came into the store during that period. She knew the fair value of such goods, and it was a part of her business to sell them to customers. She saw all the goods that were taken away by the defendants. She well might be permitted to give her opinion of their value.

2. The affidavits of the defendant Simon Rothschild and of his attorney Einstein, filed in the case in New York, were rightly admitted.* This defendant said that he was present at the interview referred to in the affidavit of Einstein, and that he knew the contents of Einstein's affidavit, and that the statements therein were true. These statements thus became admissions of the defendant, and they tended to establish the plaintiff's contention that McKeon was insolvent, that the defendants had reasonable cause to believe that he was insolvent, and that the goods were delivered as a preference.

3. The affidavit of the defendants' agent, Frank Rothschild,

* This was an action brought by the present defendants against McKeon for goods sold and delivered.

filed in the same case in New York, was competent. It tended to contradict some parts of his testimony in the present case which were unfavorable to the plaintiff, and although the plaintiff called him as a witness, his adverse testimony might be contradicted by showing what he had previously stated, first directing his attention to the former statements by a question. Pub. Sts. c. 169, § 22. No contention was made that the requirements of the statute were not sufficiently complied with by the interrogating counsel. *Exceptions overruled.*

JOHN B. DEMERS vs. JAMES MARSHALL.

Bristol. October 20, 1898. — March 1, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, BARKER, & HAMMOND, JJ.

Personal Injuries — Master and Servant — Dangerous Machine — Action.

An action cannot be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for personal injuries sustained by a boy eighteen years old, who, in the performance of his duties as an apprentice in a machine shop, while oiling the bearing of a revolving shaft, is caught by a projecting set screw which fastens a collar to the shaft near the bearing.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. The declaration contained counts at common law and under the employers' liability act, St. 1887, c. 270. The case was tried in the Superior Court, before *Hammond*, J., and, he having ceased to be a justice of that court, a bill of exceptions, at the request of the parties, was allowed by *Dewey*, J., in substance as follows.

The accident happened in the machine shop connected with the hat manufactory of the defendant.

The plaintiff was injured while oiling a countershaft, in which was a set screw that projected from the shaft, according to the evidence, between one and one eighth inches and one and seven eighths inches. There was no contention but that this set screw was a device in common use, and suitable for the purpose for

which it was intended. The countershaft was twelve feet long, eight feet and nine inches from the floor, and suspended from the ceiling by two hangers, one near each end. The ceiling was about ten feet and three inches from the floor. In each hanger was a small hole by means of which to oil the bearing. The accident happened near the hanger at the south end of the shaft. Just north of this hanger and close to it was a pulley twenty-six inches in diameter, and just south of the hanger was a collar about two inches wide, seven eighths inches thick, and three and five eighths inches in diameter. This collar kept the shaft in place, and the purpose of the set screw was to fasten the collar to the shaft. The set screw was half an inch in diameter, and it had a square head also half an inch in diameter. The end of the shaft projected southerly beyond the collar about fourteen inches. The oil hole in the bearing was on the east side of the shaft, and close to the set screw. Just east of the centre of the bearing, and about fifteen inches distant therefrom, was a post which supported the beam and the ceiling from which the hanger was suspended. The shaft was about one and seven eighths inches in diameter, and revolved at a speed between ninety and one hundred revolutions a minute. The room was on the ground floor of the building, and was lighted from windows on the south, east, and west sides.

The plaintiff testified that he reached the age of nineteen years at Christmas, 1897; that the accident occurred on December 14, 1896, at which time he had been working in the machine shop as an apprentice very nearly three weeks; that the foreman of the shop, one Sackett, told one McClellan to show the plaintiff what was to be done; that McClellan showed him about the oiling, and went and got a step ladder, and oiled the shaft, placing the ladder on the east side of the shaft, and showing the plaintiff where the oil box was, and the plaintiff oiled the rest; that the plaintiff had not oiled this shaft at all before the accident; that the oiling was done on Mondays only; that in showing him how to oil McClellan got up on the step ladder, and put the oil in the oil box, and said nothing to the plaintiff except to tell him to put the oil in the box; that the next time that he did any oiling was on the Monday two weeks later, being the morning of the accident about half past seven o'clock;

that McClellan came to him and asked him if he had oiled up, to which he replied, "No," and McClellan said, "You had better go and oil up now"; that he then went up stairs and got the ladder, and the first place he began to oil was where the accident happened; that he put the ladder upon the west side of the shaft because there were some castings on the east side; that the pile of castings was about two feet high, and spread out about five feet, and he could not put the ladder on that side; that besides the castings there were some pulleys and old pumps on the east side, the pulleys being about four feet high; that the plaintiff brought some of the castings there himself under Sackett's orders; that the pulleys were rolled in by McClellan, another boy, and the plaintiff; that he could see the shaft from the floor and see it turn; that he looked at it before he went up, but did not see any set screw; that he placed his ladder, looked up, and then went up with the oil can and oiled the shafting; that when he got up there he did not see any set screw; that to oil the shaft he stood on the next to the top step; that he reached over with his left hand to oil, and while he was oiling something grabbed his sleeve, and he tried to pull away, but he could not do so, and it drew him right on to the shaft; that while he was doing that work he was looking where to oil, and did not see anything on the shaft or collar, or any place there that he thought could catch him; that he wore an over-all jacket with loose sleeves, as loose as an ordinary jacket sleeve; that nobody ever told him about the set screw being there, or gave him any warning about it at all; that he saw no reason why he should not oil from that side as well as from the other; that he could not take the castings away without Sackett's order; that Sackett told him to put them there; and that nobody told him of any danger at all about that place.

It was admitted by the defendant that it was the set screw which caught the plaintiff.

On cross-examination, the plaintiff testified that previously to becoming an apprentice in this shop he had been doing nothing for a long time; that before that he had been working at weaving for three or four months; that he was learning at one mill, and afterwards ran four looms at another mill; that these looms were connected with the shafting; that he saw the shafting,

belts, and pulleys; that he understood the machinery was run by belts and pulleys; that he was a little familiar with running machinery; that he could have laid the castings one side; that he did not know that Sackett would have been satisfied to take them away from there; that he knew that the shaft was in motion at the time he placed his ladder there; and that he could see the oil hole from where he was standing.

He also testified as follows: "I looked for the oil hole, that is all I looked for. . . . I was n't looking for the set screw. . . . I was just looking where to oil, that is all."

On re-direct examination, he testified as follows: "Q. Did you know that any set screw or set screws were used on the shafting at all? A. No, I did n't. — Q. As far as you saw from where you were standing, could you see that there was any danger of your getting caught on the shaft? A. No, sir."

Alexander McClellan, called as a witness by the plaintiff, testified that Sackett told him to show the plaintiff where to oil the shaft, and do the work of an apprentice, and what those duties were, and the witness did show him; that in showing the plaintiff how to oil the shaft, the witness took the step ladder and put it on the floor and oiled the bearing where the oil goes in, putting his left hand against a staircase; that there were on that day no castings, or anything underneath that interfered with his getting the ladder in position; that he told the plaintiff to oil once a week, Monday being the day to oil; that on the day of the accident he asked him if he had oiled the shafting, and he said he had forgotten it, and would go and do it, and he went and got an oil can, and then he went up to the machine shop upstairs and got a step ladder; that there were at that time some castings underneath the shaft to interfere with the plaintiff's putting the ladder in the same place that the witness did to oil; that these things were arranged on the floor as if carried in and just thrown down, and were all lying intermingled with one another; that if the plaintiff had put the ladder on the castings it would have been dangerous to stand on; that the plaintiff put his ladder on the other side, which brought his left side nearest to the oil hole; and that he did not see him oiling the bearing at all, and "the first thing I knew was he called out."

On cross-examination, he testified that the morning he showed the plaintiff where to oil, the plaintiff was standing on the floor where he could see all the time; that he could see the set screw going round if he looked at it; that he could see it from the floor anywhere around there and underneath it; that he could do the same at the time he was hurt; that one of the largest castings weighed about twenty-five pounds; and that they were thrown down and used in the machine shop as they were wanted.

George Jack, called as a witness by the plaintiff, testified that he was a machinist in the employ of the defendant; that he noticed the castings that were lying on the floor; that the pile was irregular, occupying four or five feet of space, and about a foot high; that in order to use the ladder on that side one would have to remove the castings; that he remembered seeing the set screw often when it was revolving; and that he was familiar with the fact that such things are used on every shaft.

On cross-examination, he testified that he could see the set screw revolving, and could see it from the floor the day of the accident; that there was nothing, so far as he knew, to prevent the plaintiff from pushing the castings one side if he wanted to; that the accident happened about eight o'clock in the morning; and that there was no darkness that would interfere with seeing on the day and at the time of the accident.

The defendant called as a witness Charles E. Sackett, the foreman of the shop, who testified that there was no rule or custom or order that he knew of which prevented the plaintiff from moving the castings if he wanted to put his ladder there; that he said nothing to him about placing his ladder, and he did not know that he put it there; that as the set screw moved around it was coming towards the plaintiff while he was oiling; and that it always turned that way.

At the conclusion of the evidence, the defendant asked the judge to direct a verdict for him, but the judge refused so to do.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. F. Jackson & R. P. Borden, for the defendant.

J. W. Cummings, (*E. Higginson* with him,) for the plaintiff.

BARKER, J. This case offers another instance of injury sustained by the presence of a projecting set screw as a part of machinery with which the plaintiff had to do in his work, and is governed by *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153, and by *Ford v. Mount Tom Sulphite Pulp Co.*, ante, 544.

Exceptions sustained.

CHESTER SPRAGUE & another vs. DOUGALD McDUGALL
& others.

Middlesex. November 7, 1898. — March 1, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Mechanic's Lien — Account — Contract — Mortgage.

At the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for materials furnished under a contract to furnish at defined prices all the lumber to be used in the erection of a house, the petitioner testified that the owner told him that the floor boards were not holding out; that the petitioner and the owner went to the house and measured them, and it appeared that the owner had made a mistake in his measurements in the first place, which he admitted; and that the petitioner told him to come and get the balance, which he did. This material appeared as the last two items in the account under a date four months after the first date. *Held*, that the evidence warranted a finding that these two items were for lumber furnished in accordance with the original contract.

An agreement with the owner of land, to furnish him at defined prices with all the materials of certain specified kinds to be used in the construction of a house thereon, is a contract under which a mechanic's lien, under Pub. Sts. c. 191, can be established for materials furnished after, as well as before, the recording of a mortgage of the land.

PETITION to enforce a mechanic's lien, under Pub. Sts. c. 191, for materials furnished in the erection of a house and barn on land of the respondent McDougall in Newton. Trial in the Superior Court, without a jury, before *Richardson, J.*, who found for the petitioners; and the respondent mortgagees alleged exceptions. The facts appear in the opinion.

J. Fox, for the respondent mortgagees.

J. H. Vahey, for the petitioners.

BARKER, J. The exception founded on the date of the last two debits having been waived, the only question for decision is

that raised by the request for a ruling that the pleadings and evidence do not show a ground for maintaining the lien. In support of the exception the only contentions made are that the materials charged for in the last two items of the account were not furnished under the same contract with the materials charged for in the earlier items, and next that the contract under which the materials were furnished was not such a contract as would give the petitioners a lien as against a subsequent mortgagee under the provisions of Pub. Sts. c. 191, § 5.

1. The evidence justified a finding that the petitioners agreed to furnish at defined prices all the lumber for the house and barn except the materials for what the parties called "the inside finish," which the owner got at other places. The last two items charged were for floor boards and white wood.* It is natural enough that a builder should by an error of calculation order too little of any particular kind of lumber, and when the deficiency is ascertained order enough more to finish the work. Upon the evidence it was competent for the court below to find that the last two items were for lumber furnished in accordance with the original agreement between the petitioners and the owner of the land, that the former should furnish at agreed prices all the lumber for the house and barn except "the inside finish."

2. The agreement between the petitioners and the owner of the land was made on September 25, 1895. The petitioners began to furnish materials in compliance with this agreement on October 2, 1895. The owner mortgaged to the trustees who are defending on December 4, 1895, and at that time materials had been furnished by the petitioners under their agreement to the amount of \$717.80. After that date further materials were furnished by the petitioners under the same agreement to the amount of only \$5.70. The remaining question for decision is whether this agreement of September 25, 1895, was a contract under which a lien could be established for materials furnished

* In relation to these items the petitioner testified, in substance, that the owner told him that the floor boards were not holding out; that the petitioner and the owner went to the house and measured them, and it appeared that the owner had made a mistake in his measurements in the first place, which he admitted; and that the petitioner told him to come and get the balance, which he did.

after the recording of the respondents' mortgage, as well as before.

We are of opinion that the agreement was such a contract. It contemplated the sale or furnishing by the petitioners of all the materials of certain specified kinds which should be used in the construction of the house and barn, and the purchase of all those materials by the other party, at prices which were agreed upon at the outset. Looking at the purpose of the statute as to liens on buildings and lands, it is impossible to think that it is not such a contract as under Pub. Sts. c. 191, § 5, will prevail over a mortgage recorded after the date of the agreement. This view is supported by previous decisions. See *Wilson v. Sleeper*, 131 Mass. 177; *Batchelder v. Hutchinson*, 161 Mass. 462; *Dodge v. Hall*, 168 Mass. 435; *Buck v. Hall*, 170 Mass. 419. Simpson's case in *Batchelder v. Hutchinson*, *ubi supra*, differs from the present case in this, that when Simpson stopped work to serve upon a jury there was no contract between him and the owner for future services. Here there was a contract, made before the date of the mortgage, for the lumber furnished on February 3, 1896.

Exceptions overruled.

JOHN WHELTON vs. WEST END STREET RAILWAY COMPANY.

Suffolk. November 17, 1898. — March 1, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Street Railway — Master and Servant — Act of Superintendence — Evidence — Assumption of Risk — Action.

A person was employed by a street railway corporation as a car shifter, whose duty it was to get cars ready for the conductors and motormen. Upon an occasion when a conductor went into the car-house for a car, which had to be moved to the main track by means of a transfer table moved by electric power operated by the car shifter, the latter ran the car on to the table, handed the trolley rope, which had to be shifted to the other end of the car, to the conductor, saying, "Here is the rope," and, when the conductor had walked with the rope half way round to the middle of the car, started the table. The conductor called out to him to wait, as a spring attached to the roof of the car was caught, and the conductor, while trying to free the spring, was injured by the moving of

the table. There was a foreman who had charge of the car-house, but he was not present at the time of the accident. *Held*, in an action for the injury, that the acts of the car shifter were not acts of superintendence, under the employers' liability act, St. 1887, c. 270.

In an action against a street railway corporation for injuries sustained by a conductor, while shifting the trolley rope on a car which had been run on to the transfer table in a car-house, by having his foot caught in a space of about an inch and a half between the bottom of a track rail projecting from the table and the house floor, evidence that after the accident the floor of the car-house was raised so that the projecting rail lay flush with the floor, filling the space in which the plaintiff's foot was caught, and that after the change the table worked perfectly, is rightly excluded.

A street car conductor started to shift the trolley rope on a car which had been run on to the transfer table in a car-house, which was moved by electric power operated by another employee. The conductor was walking on the floor of the car-house, and when he was half way round to the middle of the car the other employee started the table. The conductor called out to him to wait, as a spring attached to the roof of the car was caught, causing the conductor to walk back the other way, and while so doing, and looking up and trying to free the spring, a track rail, which was part of the fittings of the table, and which projected about eighteen inches from it over the car-house floor, with a space of about an inch and a half between the bottom of the rail and the floor, and which was in motion with the table, caught the conductor's foot, and he was injured. He had been in the habit of using the table several times a month for more than a year, besides having an experience of several years with quite similar tables. *Held*, that he could not maintain an action against the corporation for his injury.

TORT, for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Trial in the Superior Court, before *Sherman, J.*, who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

R. W. Nason, for the plaintiff.

G. H. Mellen, for the defendant.

BARKER, J. The plaintiff had had nine years' experience as a street car conductor in the defendant's service. He went into a car-house for a car. The car had to be moved to the main track by means of a transfer table moved by electric power operated by another employee, a car shifter, who, with the plaintiff, were the only persons in the car-house. The car shifter ran the car on to the table. The trolley rope then had to be shifted to the other end of the car. The car shifter handed the trolley rope to the plaintiff, saying, "Here is the rope." The plaintiff, taking the rope, started with it, walking on the floor of the car-house. When he was half way round to the middle of the car

the car shifter started the table. The plaintiff called out to him to wait. A spring attached to the roof of the car was caught, and this caused the plaintiff to walk back the other way, and while so doing, and looking up and trying to free the spring, a track rail which was part of the fittings of the table, and which projected some eighteen inches from it over the car-house floor, with a space of about an inch and a half between the bottom of the rail and the floor, and which was in motion with the table, caught the plaintiff's toe, threw him down, and pushed him along the floor and against another rail fastened to the floor. This occurred on June 12, 1895. The transfer table had been put in on June 2, 1894, replacing one to which power was applied in a different manner, and with rails projecting only about half as far. The plaintiff had been in the habit of using such a transfer table five or six times a month since the defendant had used electricity as a motive power. He might have got upon the car before the transfer table started, and the trolley rope was of such a length that, if in shifting the trolley pole he walked on the car-house floor, he could have kept himself beyond the reach of the projecting rails. At one point in his testimony he gave an affirmative answer to the question whether of course he had not noticed the projections before, but he testified that he took no particular notice of them, and that his attention had never been called to the fact that there was a space between them and the floor. He also testified that he was shifting the trolley pole in the same way he had always been in the habit of doing it at the times when he had done it, and that he had performed exactly the same operation in transferring a car probably a week before, and knew what was to be done. There was a foreman who had charge and control of the car-house to whose orders the plaintiff was subject when he went to the car-house for a car, but the foreman was not present at the time of the accident.

The declaration has one count under St. 1887, c. 270, for negligence of a superintendent, and one under the common law for negligently failing to furnish a reasonably safe place in which to work. A verdict for the defendant was ordered upon each count. The questions for decision are whether the verdict was rightly ordered, and whether evidence, offered by the plaintiff, that after the accident the floor of the car-house was raised so that the

projecting rail lay flush with the floor, filling the space in which the plaintiff's foot was caught, and that after the change the table worked perfectly, was rightly excluded.

There was no evidence to support the count under the St. 1887, c. 270. The foreman, who was absent, had no connection with the accident, nor was it in any way due to his absence. The whole evidence as to the duties of the car shifter is that it was his duty to get cars ready for the conductors and motormen. Neither his starting of the table nor his failure to stop it was an act of superintendency.

The evidence as to the raising of the car-house floor after the accident was properly excluded. While evidence that other safer appliances then known might have been used would have been competent, as in *Wheeler v. Wason Manuf. Co.* 135 Mass. 294, the evidence excluded was not of that character. *Dacey v. New York, New Haven, & Hartford Railroad*, 168 Mass. 479, and cases cited.

Upon the common law count the verdict for the defendant was rightly ordered, for the reason that, upon the circumstances to which the plaintiff himself testified, the risk of having his foot caught by the moving projecting rail, if looking upward at the trolley he walked within reach of the projection, was one which he either knew and appreciated, or ought from his opportunities for observation to have known and appreciated, and which he could have avoided by doing his work in such a way as to keep out of reach of the projection. If he knew the danger, he is prevented from recovering, both because he was careless in not avoiding it, and because he accepted the risk. If he did not know the danger, it was because of a negligent omission to observe what was obvious, and what due care required him to observe and to avoid. Besides an experience of three or four years with quite similar transfer tables, he had for more than a year had numerous occasions to do the same work, in connection with this table, which he was doing when hurt. *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554, and cases cited. *Goodes v. Boston & Albany Railroad*, 162 Mass. 287. *Cassady v. Boston & Albany Railroad*, 164 Mass. 168. *Quigley v. Thomas G. Plant Co.* 165 Mass. 368. *Barnard v. Schrafft*, 168 Mass. 211. *Bell v. New York, New Haven, & Hartford Railroad*, 168 Mass. 443.

Exceptions overruled.

JACOB F. BROWN & another vs. WILLIAM S. HENRY
& another.

Suffolk. January 13, 1899. — March 1, 1899.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

*Principal and Agent — Unauthorized Contract — Repudiation —
Ratification — Estoppel.*

If a principal, upon learning of an unauthorized contract of his agent, repudiates it, giving an unfounded reason for so doing, such repudiation is not equivalent to a ratification of the contract, in the absence of anything beyond this to work an estoppel.

CONTRACT, against William S. Henry and Charles C. Parsons, copartners as Henry and Parsons, to recover damages for the refusal to deliver about 25,000 pounds of Alabama wool alleged to have been sold to the plaintiffs by one Salter, a broker. Trial in the Superior Court, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

Richard J. Salter testified that he was a member of the firm of Salter Brothers, wool brokers, and had been a wool broker in Boston about four years, and prior thereto in New York and St. Louis; that he knew the defendants had about 25,000 pounds of Alabama wool for sale, they having purchased it through him some months before; that on Saturday, January 23, 1897, after an interview with the plaintiff Brown at Brown's request, he had an interview with the defendant Parsons, who authorized him to offer the wool at 16½ cents, and gave him a written order on which he secured a sample of the wool; that he called upon the plaintiff Brown, who told him that he would "take it at 16½ cents, 60 days"; that he came back to the office of the defendants, which was also his own office, he having a part of their office, expecting to find Parsons there, but Parsons had left; and that he sat down and wrote a "bought note," of which the following is a copy:

"Boston, January 23, 1897. Brown & Adams, City. Gentlemen: We beg to advise having bought for your account to-day, of Messrs. Henry & Parsons, about 25,000 lbs. Ala. wool, stored

in the Fort Hill storage warehouse, at $16\frac{1}{2}$ c. per pound. Terms 60 days. The wool to be paid for within 60 days, and interest allowed for the unexpired time. Buyers to have the benefit of unexpired storage and fire insurance, and to assume charges therefor. Sacks at value. Tare three pounds per sack. Respy., Salter Brothers, Brokers."

He further testified that he gave to the defendants a "sold note" similar in its tenor to the "bought note"; that there was a custom in the wool trade by which, if nothing is said to the contrary, the term of credit is sixty days; that there was a custom in Boston to allow for foreign substances in wool tare three pounds, and for purchasers to take sacks containing the wool at value; that there was also a custom in Boston to allow the benefit of unexpired storage and unexpired fire insurance on wool, when nothing is said about it in the terms of the trade, if the buyer does not want to move the wool; and that this allowance extends to the end of the month within which it is bought.

The witness further testified that he immediately left for St. Louis, and there received a telegram from the defendants, dated January 28, as follows: "Sale note not accepted, Parsons gave no definite sale price"; — that, upon information received by him from New York before the receipt of the above telegram, he telegraphed the defendants as follows: "What is wrong about Georgia sale? The price was given me by Mister Parsons, and wool sold in good faith"; — and that he also telegraphed the defendants on the same day as follows: "If Mr. Parsons reflects, he will sustain my sale so far as price is concerned."

On cross-examination, the witness testified that the supply of Georgia and Alabama wool in the Boston market was limited at this season of the year; that the plaintiffs and the defendants were, in a sense, rivals on those wools in this market; that this lot of 25,000 pounds was practically all of the Southern wool — at that time in this market offered for sale which was not owned by the plaintiffs; that the lot of wool had been withdrawn from the market by the defendants within a week of January 23; that he did not write out the "bought note" to the plaintiffs when they agreed to pay $16\frac{1}{2}$ cents, but after he had returned and found Parsons absent; that he went back to the defendants to say that he had closed the wool, that they might know the

wool was sold and not market it again ; that it was the practice, after he had had a price given him on wool, and had gone to a man who would buy at the price, to go back to the seller and notify him what he had done, to tell him the price and terms he had sold on, and for confirmation of the sale ; that he had not had a word with either of the defendants as to sixty days ; that the plaintiff Brown wanted it on sixty days, and he went back to ask the defendants to say how Brown should buy it, never dreaming that there would be any objection ; that they had a right to say whether they had any objections ; that the time was between twelve and one o'clock, and he was going to St. Louis at three o'clock ; and that he fixed the terms himself, because there was nothing said about terms on the part of the defendants, and if they had said they wanted net cash, he would have insisted on that.

Jacob F. Brown, one of the plaintiffs, testified that he was a member of the firm of Brown and Adams, wool dealers in Boston, dealing very extensively in Southern wool ; that in January, 1893, his firm held practically all of that wool in the Northern market ; that there was no other on the market offered for sale except the lot in suit ; that he received a "bought note" from Salter on the afternoon of Saturday ; that on Monday afternoon, after four o'clock, he sent a messenger to the defendants to get an order for some of the wool for the following morning, and the messenger did not get it ; that Tuesday morning he went up to see Parsons, and had an interview with him about noon ; that there is a custom in the wool trade in Boston that sacks be taken at value and tare, three pounds per sack for foreign substance ; that where nothing is said as to the terms of credit, the credit is sixty days ; that there is a custom in the trade in Boston, where nothing is said with reference to unexpired storage and insurance, that the buyer has the benefit of the unexpired storage and insurance for the current month ; that at the interview with Parsons on Tuesday, Parsons said that Salter had no authority to sell the wool at 16½ cents, that the plaintiffs could not have the wool, and that he did not propose to have Salter run his business ; that no other objection to the authority of Salter was made than that he was not authorized to sell at that price ; that he did not think Parsons said anything with refer-

ence to the other terms of the sale; that he told Parsons he had himself already sold the wool to one of his customers; that there was no further interview with Parsons; that his firm is and was at that time in good financial standing; and that about February 4, Henry, who had been ill and away from the office, called upon him and said he regretted that the trouble had arisen between Salter and Parsons about the giving of the price of $16\frac{1}{2}$ cents, and did not object to any of the other terms of the contract, except the price, or question the credit of the plaintiff's house.

It appeared that between January 26 and February 11 there was considerable correspondence between the parties, in which the plaintiffs insisted upon the contract of sale being carried out, and the defendants denied Salter's authority to make the sale.

On cross-examination, the witness said that he bought the wool a cent a pound below the market of Saturday; that where a broker is given a price on a lot of wool, and finds a customer at that price, the seller has no further control of the sale if the buyer is responsible; that if he is irresponsible, the seller can repudiate the sale; and that he knew at half past four o'clock on Monday, January 25, when he sent for certain bags of wool, that he did not receive them, and this was the first knowledge he had that the defendants would refuse to deliver the wool.

It appeared from the defendants' testimony that the defendant Henry was at home ill on January 23, and remained there for some days thereafter; that the first knowledge of the alleged sale to the plaintiffs which either partner had was from receiving the "sold note," which was seen by Henry at his house on Sunday about noon, but not seen by Parsons until he arrived at the office on Monday morning.

The defendant Parsons denied having given Salter authority to sell the wool at $16\frac{1}{2}$ cents. Both the defendants and other witnesses familiar with the wool trade testified that there was no custom in the trade by which, where no terms were given to a broker, the sale was understood to be upon sixty days, or by which a customer had the right of payment within sixty days less interest, or by which a buyer had the benefit of unexpired storage and insurance, or by which unexpired storage and in-

insurance meant the unexpired balance of the current month. The defendant Parsons testified, on cross-examination, that at an interview with his partner on Saturday night at his house he told Henry of his talk with Salter; that Henry did not approve the sale at $16\frac{1}{2}$ cents; that they there decided that they would not sell the wool at that price; that it was Tuesday morning before he notified the plaintiffs finally that he was not going to sell the wool at $16\frac{1}{2}$ cents; and that he did not notify them before, because he wanted to talk it over with Henry before deciding.

The defendants asked the judge to rule, among other things, as follows: "1. On this evidence the defendants are entitled to a verdict. 2. Salter Brothers had no authority to bind the defendants to 'Terms 60 days.' 3. There is no evidence that the defendants waived any right to object to 'Terms 60 days,' or ratified Salter's action in inserting that clause. 4. There is no evidence that the defendants waived any right to object to the provision, 'Buyers to have the benefit of unexpired . . . fire insurance,' or ratified Salter's action in inserting that clause."

The judge declined to give these rulings, and instructed the jury, among other things, as follows:

"If you are satisfied that the burden of proof has been sustained, and that Salter did have authority to sell this wool at $16\frac{1}{2}$ cents a pound, and the authority was given him by Parsons, of the firm of Henry and Parsons, then there remains a further issue for your consideration. I instruct you that, as matter of law, such authority, if given by Parsons to Salter, and nothing further appearing in the case, it is a cash sale; as soon as perfected and delivery is made, the buyers would be called upon to pay cash to the seller, but upon examination of the memorandum of sale, the contract of sale, it appears that there are other terms besides the price per pound and quantity, and you can read the terms through. Something is said about the terms of payment, and also as to the buyers having the benefit of unexpired storage and fire insurance, and to assume charges thereafter, 'sack at value.' . . .

"The plaintiffs go forward and say that, notwithstanding that is so, yet by a usage or a custom known to the wool trade, and obtaining in the city of Boston, when Salter had authority from

Parsons to sell this wool at the price per pound, he also had authority upon making that sale to add to it the other terms, or, in other words, that there is a custom and usage in the wool trade in Boston which gave that authority. It becomes, therefore, necessary for the court to instruct you upon this branch of the case, and I do instruct you, that a custom within the meaning of the law, if a general custom, is incorporated into and becomes a part of every contract to which it is applicable; if local, by the very contract made, the parties having knowledge of or bound to know its existence; it must be certain, definite, precise, and unvarying. . . .

“ But the plaintiffs go further, and say that in this case, if you should find that there was no such usage or custom that it could be fairly said to have formed a part of the contract between the parties, yet they are entitled to have you consider a further issue in this case, and that is that notwithstanding, if it be a fact, that if Salter had authority from the defendants only to sell so much wool at so much per pound, which would be a cash sale, yet having sold it under terms and conditions which are expressed in this contract, which contains very much more than the sale of so much wool at so much per pound, the defendants, when they knew that it had been so done, instead of repudiating, instead of saying that they were not bound by any such contract as that by reason of the addition of these various things to which I have called your attention, chose to base their refusal to perform upon the one objection that Salter never had any authority to sell the wool at $16\frac{1}{2}$ cents per pound, and that having so done it is not now open to them to come here and say that they rely upon want of authority in Salter to add the other terms which appear in the contract thereto.

“ The doctrines of waiver and estoppel, and of ratification, rest upon distinct legal conceptions, and in this case the plaintiffs put their right upon this aspect of the evidence upon ratification; and I instruct you that if you find upon the evidence in this case, after the making of this contract by Salter, acting as agent for Henry and Parsons, that contract was brought to the knowledge of the defendants, or either of them, and they accepted (and such acceptance might be by the act of both, or by the act of one of the partners) the act of Salter, and adopted

that act and made it their own, then in law it is the same as though the defendants, on the 23d of January, 1897, had themselves signed that memorandum, signed that contract, and delivered it to the plaintiffs; and you may proceed as though on that day the minds of the parties, that is, the plaintiffs and the defendants in this case, met, and the memorandum was made which was incorporated into that paper, called here 'the contract of sale,' and delivered by the defendants to the plaintiffs. But before you apply that, it will be necessary for you to look at the evidence to ascertain whether or not, fairly weighed, it is enough to satisfy you that the defendants did so assent. . . .

"Now, at that time, when the discussion first began as to whether or not the contract should be performed, and when Parsons and Henry, one or both, began to talk with the plaintiffs, one or both, or wrote letters or sent telegrams, what did Henry and Parsons, one or both, know of the terms of the alleged contract which the plaintiffs claim bind the defendants? Did they know all the terms of it, and, having a duplicate before them and being able to read it, could they have known all the terms of it as well as the clause which related to the price per pound? If they did have that knowledge of the terms of that contract, and if the plaintiffs then asked the defendants to perform and carry it out, and the defendants then gave their reason for not performing, carrying it out, and the reason was the price per pound and none other, and thereafter, and during the writing of all these letters, during the sending of the telegrams and replies, and the personal interviews, they still said that the only reason why they would not perform and did not recognize the contract as binding upon them was the price per pound, and nothing else, that is evidence for you to consider, whether or not by so doing they did not give the plaintiffs to understand that that was the only clause in that contract to which they objected, and that as to all the other clauses or terms of that contract they had nothing to say; or, in other words, was their silence, coupled with their declarations, enough to satisfy you, plus the other evidence to which I have called your attention, that as to all the other terms of that contract, with the exception as to the one as to price, they were satisfied

with what Salter had done, and if the price had been right they would have made no objection to any part of it? If so, then I instruct you that their conduct and their acts will be sufficient, with the instruction which I have given you, for you to find that they ratified and confirmed what Salter had done. But if, on the other hand, during all this matter of dispute and negotiation between the parties, the defendants in this case, though specifying only that the price per pound was the reason why they did not perform, was the reason why they did not confirm and recognize the act of Salter, at no time intended that the plaintiffs should understand that they waived or did not intend to rely upon objections to the other terms to the contract, or that by objecting to that one clause of it they had thereby objected to the whole, and did not think it was necessary to specify it, then and in that case there would not be ratification."

The jury returned a verdict for the plaintiffs, and, in answer to an inquiry by the judge, whether they found that there was such a custom in the wool trade as was claimed by the plaintiffs, replied "that they found that there was not such a custom." The defendants alleged exceptions.

S. J. Elder, (*E. A. Whitman* with him,) for the defendants.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiffs.

KNOWLTON, J. It appeared upon the undisputed evidence that the broker inserted in the written memorandum of sale certain provisions which were not expressly authorized by the defendants. The jury found that there was no custom under which he could bind the defendants by these agreements. He was not the defendants' general agent, and the terms of his authority to make a sale could be inquired into. He could bind the defendants only by such a contract as they authorized him to make. *Coddington v. Goddard*, 16 Gray, 436. *Remick v. Sandford*, 118 Mass. 102.

Under the instructions of the court and the finding above stated, the verdict for the plaintiffs must rest on a finding that the defendants ratified the broker's contract. The jury were allowed to find ratification on the ground that the plaintiffs were right and the defendants wrong in regard to the defendants' contention that the broker was not authorized to sell the wool at the price named in the contract, it appearing that the

defendants stated, as their reason for repudiating the contract, that the broker had no authority to sell the wool at that price, and failed to make any objection to the provisions of the contract about credit, the allowance of interest, unexpired storage, and fire insurance. These latter provisions were inserted in the contract by the agent without authority. There was no evidence that the situation of the plaintiffs was changed, or that their rights were in any way affected by reason of the form of the defendants' objection and disavowal.

Where something is to be done by one of two parties as a condition precedent to his exercise of a right against the other, the other may waive the performance either wholly or in part. If there is an attempt at performance which falls short of the requirement, and if objection is made by the party for whom it is done, with a statement of the grounds of his objection, the objector often is held to have waived his right afterwards to object on other grounds, when the other has gone forward relying upon the implied representation that the performance is satisfactory in other particulars. *Clark v. New England Ins. Co.* 6 Cush. 342. *Searle v. Dwelling House Ins. Co.* 152 Mass. 263. *Curtis v. Aspinwall*, 114 Mass. 187. *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234. *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410. These cases rest upon the ground that, when one is stating objections, a failure to disclose a ground of objection in a particular which easily could be remedied tends to mislead the other party to his detriment, and is so contrary to justice and good morals as to work an estoppel against doing it afterwards.

No such principle is applicable to the present case. We have an unauthorized contract made by an agent. The plaintiffs had no rights under it immediately after it was made. They have no rights under it now unless the defendants ratified it. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it." *Combs v. Scott*, 12 Allen, 493, 497. *Greenfield Bank v. Crafts*, 2 Allen, 269. If, however, one is acting in the execution of a general power, but in a mode not sanctioned by its terms, and if any benefit comes to the principal from the act, ratification may be implied pretty quickly from lapse of

time with knowledge of the circumstances. *Foster v. Rockwell*, 104 Mass. 167. The evidence is undisputed that, within a reasonable time after being informed of the contract, the defendants in the present case repudiated it. The naked question is presented whether, if a principal, on learning of an unauthorized contract of an agent, repudiates it, giving a reason for so doing which proves to be without foundation, such repudiation is equivalent to an adoption of it. In the absence of anything beyond this to work an estoppel, we are of opinion that it is not. Ordinarily, ratification of an agent's act is a mere matter of intention. In the present case the defendants, as soon as the facts were ascertained, manifested in the clearest manner their intention not to ratify, and their subsequent conduct has all been consistent with their original repudiation of the attempted sale. They could not repudiate it in part and adopt it in part. 1 Am. & Eng. Encyc. of Law, (2d ed.) 1192, and cases cited. There is a class of cases in which the principal receives a direct benefit from an act of an agent, and it is held that, if he retains this benefit for a considerable time after he obtains full knowledge of the transaction, he thereby ratifies the act. *Brigham v. Peters*, 1 Gray, 139. *Sartwell v. Frost*, 122 Mass. 184. *Coolidge v. Smith*, 129 Mass. 554. Here, too, there is an element of estoppel which does not exist in the case at bar. One cannot have the benefit of an unauthorized act of an agent without confirming it. Ordinarily, a principal is not called upon to give reasons for declining to be bound by an act undertaken without authority. The controlling reason is that it was unauthorized. The particulars in which it lacks authority usually are of no importance. If the other party relies upon it, he has the burden of showing ratification. If the principal insists that it is unauthorized, and does nothing and says nothing which warrants the other party in treating it as ratified, the mere fact that he is incorrect in his statement of the particulars of the want of authority does not change his repudiation of the act into an adoption of it. We are of opinion that the instructions in regard to ratification were erroneous, and that the jury should have been instructed that there was no evidence that the defendants ratified the contract declared on. See *Price v. Moore*, 158 Mass. 524.

Exceptions sustained.

PUTNAM NATIONAL BANK vs. WILLIAM M. SNOW & another.

Suffolk. November 9, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Bill of Exchange — Authority to draw — Discount on Faith of Assurance by Drawee — Promise to accept — Action.

In an action by a bank upon an alleged promise to accept and pay drafts drawn by A. on the defendant and discounted by the plaintiff, two letters written by the defendant to A., which were shown by him to the plaintiff's cashier, and which conferred implied, if not express, authority upon A. to draw on the defendant for fruit which he was to ship to him, were put in evidence. There was also evidence tending to show that the defendant told the plaintiff's cashier that A. was to buy and ship fruit for his house, that he had authority to draw on the house, and that his drafts would be honored. The defendant testified that there was an agreement as to fruit from a certain grove that he would advance a sum named per box while A. should keep his account "margined up." One of the letters to A. also spoke of a draft at that rate per box. A. denied that anything was said to him about keeping his account "margined up," and testified that he drew many drafts on the defendant which were discounted by the plaintiff during certain months. *Held*, that there was evidence warranting a finding that A. had authority to draw the drafts in question, and that the plaintiff discounted them on the faith of assurances made to it by the defendant that drafts drawn by A. would be accepted and paid.

For the breach of an oral or written promise to accept a non-existing bill of exchange an action will lie by the holder of a bill drawn pursuant to such promise, and taken by him on the faith of it.

CONTRACT, in nine counts, against William M. Snow and Edward A. Snow, copartners as Snow and Company. The ninth count, which is the only one material to be stated, alleged that in 1894 the defendants entered into an agreement with Robert Long, by which he was to ship oranges from Florida to them in Boston, and in consideration therefor the defendants agreed with Long in writing that as shipments of oranges were made he might draw upon the defendants for an amount equal to \$1.10 for each box of oranges so shipped, and that they would accept and pay such drafts, and the defendants also promised the plaintiff that they would accept and pay such drafts; and that on December 13 and 15, 1894, Long shipped a large number of boxes of oranges to the defendants, and made seven bills of ex-

change upon the defendants payable to the order of Long, for a sum amounting to \$1.10 for each box of oranges so shipped, and Long indorsed the drafts to the plaintiff, which discounted the same, relying upon the written and verbal promise of the defendants to accept the same, and duly presented the same to the defendants for acceptance and payment, but the defendants refused to accept or to pay them.

Trial in the Superior Court, without a jury, before *Bond, J.*, who allowed a bill of exceptions, in substance as follows.

Robert Long testified that he was an orange grower, and was acquainted with the defendants; that he received a letter dated October 8, 1894, signed "Snow & Co.," and also a letter dated November 30, 1894, signed "Snow & Co."; that his arrangements with the defendants were oral, except so far as appeared in the correspondence in evidence; that during October, November, and December, 1894, he made no drafts on the defendants; that he showed the letters of October 8 and November 30 to George L. Pace, cashier of the plaintiff bank, and Parker A. Smith, its vice president, soon after receiving them; that the instructions received from the defendant E. A. Snow orally, and the letters of October 8 and November 30, he communicated to the cashier; that he drew many drafts on the defendants without bills of lading attached, which were discounted with the plaintiff bank and paid by Snow and Company during the months of October, November, and December, 1894; that he drew all the drafts in suit, and had them discounted at the plaintiff bank; that he made shipments of oranges to the defendants on which he drew the drafts in suit; that up to December 15 he had made various shipments, some under his personal account and some under the accounts of various non-resident growers, represented by his name and different numbers, so that the various shipments and accounts could be distinguished; and that the defendants had never revoked his authority to draw upon them or to discount drafts so drawn.

On cross-examination, he testified that the original agreement did not impose upon him the necessity of attaching bills of lading, but that he did so in a great many cases; and that Snow and Company never said anything to him about margining up his various accounts.

Parker A. Smith testified that he was the vice president of the plaintiff bank at Palatka, Florida, which position he held during October, November, and December, 1894; that he was acquainted with the defendant E. A. Snow, and met him in November and December many times at the plaintiff bank when he called on business; that he had no conversation with him about Long's drafts, but was present during a conversation between Pace, the cashier, and Snow, in which Snow said that Long was under contract with his house to purchase and ship the fruit from several orange groves in and around Interlachen, Florida; that Long would draw on the house of Snow and Company at Boston against such shipments, and such drafts would be honored; that it was the understanding that bills of lading should be attached to the drafts, but that any drafts that Long would draw would be all right; that this conversation was on or about November 13, 1894; that Snow said on December 28 or 29, 1894, that the drafts in suit would be paid; that he did not understand why the drafts on the house had been refused, but he would wire the house and find out; that later he told Pace that some of the fruit shipped by Long was in bad order, and that the house proposed to hold Long for a portion of the loss; and that, upon being pressed to take up the drafts, Snow said, "You need not worry. The bank shall not lose a cent. Snow & Co. are good for the drafts. They will be paid."

On cross-examination, he testified that he did not become acquainted with Long until the winter of 1894-95, and considered him a responsible person; that he made no representations to the defendant as to whether he was responsible or not; that Long represented himself to be under contract with Snow and Company, with authority to draw on them; that the rate of \$1.10 per box was not known to the witness; that the first lot of drafts was cashed upon receiving telegrams from Snow and Company to do it; that Long did not show his authority at first; that the bank did not rely at all on Long's statements; that the later drafts were paid by the bank after Snow had been at its office and instructed it to pay them; and that the bank relied entirely upon Snow and Company's telegrams, and Snow's statements made later in person to the bank.

The defendants offered in evidence their correspondence with

Long, referred to in his testimony, and the material parts of which were as follows.

The letter of October 8, 1894, contained the following: "As regards your oranges, we are willing to do whatever you desire us to do, and we will accept your draft for the amount named, but we think that all this could be arranged when we get there. But, in any event, if you feel like securing this lot, we would like to have you do so."

The letter of November 30, 1894, contained the following: "Your esteemed favor of the 27th is received, . . . and notice that you will draw \$1.10 per box on these as per arrangement with our Mr. E. A. Snow. . . . As to B/L attached to drafts or sent direct to us, it makes no difference. The banks always like to have the B/Ls attached as a guaranty of good faith probably more than anything else; and very often B/Ls are written to the order of shipper and then attached to the draft, which holds the goods to the bank until the drafts are paid. In your case it makes no difference, however. You can send the B/Ls direct to us and it will be all right, and perhaps better, as we will no doubt receive a B/L direct from you earlier than it would come through the bank, and give us information that we would like."

E. A. Snow, one of the defendants, called as a witness, testified that he was a resident of Boston and a member of the firm of Snow and Company, which firm was in the fruit business, for the most part selling fruit at auction in large quantities; that he met Long in Florida in the winter of 1894-95; that he had had correspondence with him before he saw him in Florida; that he dictated the letter of October 8, 1894, before going to Florida; that one Francis had a lot of oranges to pick from a grove known as "Hard Bargain Grove"; that Snow and Company did not buy these oranges, but Long bought them, Snow and Company advancing \$500 as a loan to Long to enable him to make the purchase; that there was an agreement as to the oranges from this grove, that Snow and Company would advance \$1.10 per box, while Long should keep his account "margined up"; that there was no special agreement as to any other grove; that of the drafts in suit three were on account of the "Hard Bargain Grove," at the rate of \$1.10 per box; that he had a conversation with

Pace, the cashier, at the plaintiff bank; that he thought Long was present; that he did not at the time know Parker A. Smith; that he told Pace that Long was shipping oranges, and was drawing \$1.10 per box, and that his account would be all right so long as he kept his accounts "margined up"; that he did not state it as appears in Smith's testimony; that at the time these drafts came on and were refused, Long's account was overdrawn; that when the drafts were returned, Pace asked him why they had been refused; that he told him there was no trouble with Snow and Company, but that he presumed Long had overdrawn his account; that Pace did not then state in any form of words that he considered Snow and Company liable; that he never said to Pace in Smith's presence that Snow and Company were good for the drafts, and that they would be paid; that the term "margined up" meant keeping the account so that a man should not draw more than was his due; that they did not credit oranges to the shipper until they are sold; and that if shipments had been made sufficient in value to meet the amount due from the shipper, then the account was "margined up," but if the proceeds of the sales were less than the amount drawn, the account was not "margined up."

On cross-examination, he testified that there was no general arrangement except on "Hard Bargain Grove"; that the only drafts which he gave permission to draw at \$1.10 were on that grove; that it made no particular difference to him whether the bills of lading were attached or not; that he never made the claim in January that the reason the drafts were not honored was because bills of lading were not attached; and that he did not remember telling the plaintiff's attorney that he had told Pace that the drafts would be all right without bills of lading attached.

Willis J. Freeman, called as a witness by the defendants, testified, in substance, that he remembered when the drafts in question were presented; that the shortage then on Long's account was between \$2,000 and \$2,500; that later some fruit came on and the shortage was reduced to about \$437; that Long's account was not "margined up" when these drafts were presented, but it was short more than \$2,200; and that all the goods had been disposed of at that time.

The defendants asked for the following rulings, among others:

"1. An oral promise to accept drafts not then in existence, and not exactly or substantially described or identified, is not an acceptance of drafts thereafter drawn, and gives the holder no right to recover upon drafts subsequently drawn and not accepted in the usual manner.

"2. There is no sufficient evidence in the case to entitle the plaintiff to recover upon its ninth count.

"3. An agreement between the defendants and Robert Long, whereby the defendants agreed with Long that Long might draw \$1.10 per box, would not entitle the plaintiff to recover upon drafts drawn on the defendants by Long and not accepted by the defendants. Long is the only person, if any, who could sue for breach of such an agreement, and the evidence is that no such agreement was communicated to the plaintiff or relied upon by it.

"4. The only evidence for the plaintiff is that it did not rely upon Long's statements as to any contract with Snow and Company, and did 'rely entirely upon Snow's statements made later in person to the bank.' The plaintiff cannot, therefore, recover upon the allegations of its eighth or ninth counts, but must recover, if at all, upon its alleged conversation with E. A. Snow, as that conversation, in its aspect most favorable to the plaintiff, created no liability to the plaintiff upon drafts thereafter drawn by Long and discounted by the plaintiff.

"5. Upon all the evidence in the case upon the pleadings, there must be judgment for the defendants upon all the counts.

"6. The plaintiff makes no claim that it relied upon any contract or arrangement between the defendants and Long. It therefore cannot recover upon the eighth or ninth counts.

"7. An agreement to accept bills thereafter to be drawn, to be binding, must describe the bills in specific terms so as to identify them; a general authority to draw bills will not create a liability to third persons upon particular bills afterward drawn."

The judge declined to give the rulings requested; and the defendants excepted. The judge found for the plaintiff on the ninth count, assessing damages at \$704.92, being the amount of the three drafts at \$1.10 per box; and the defendants alleged exceptions.

W. R. Sears, for the defendants.

F. H. Williams, for the plaintiff.

MORTON, J. The finding was for the plaintiff on the ninth count for the three drafts that were drawn for oranges from the "Hard Bargain Grove" at \$1.10 per box, and the exception is to the refusal to give the rulings requested so far as they related to that count. The other counts and the rulings relating to them are immaterial.

The ninth count was upon a promise to accept, and alleged in substance a promise in writing by the defendants to Long to accept and pay drafts drawn by him on them equal to \$1.10 per box of oranges shipped, and also a verbal promise to the plaintiff to accept and pay such drafts, and that, relying on the written and verbal promises, the plaintiff discounted the drafts in suit for Long, and upon presentation the defendants refused to accept or pay them.

One question is whether there was any evidence to warrant the finding. The letters of October 8 and November 30 from the defendants to Long, which were shown by him to the plaintiff's cashier, plainly imply authority on the part of Long, if they do not expressly confer it, to draw on the defendants for the fruit that he was to ship. There was also evidence tending to show that one of the defendants told the plaintiff's cashier, in substance, that Long was to purchase and ship fruit for his house, that he had authority to draw on the house at Boston, and that his drafts would be honored; and later in the trial this defendant testified, amongst other things, "that there was an agreement, as to the oranges from this grove, that Snow and Company would advance \$1.10 per box, while Long should keep his account 'margined up.'" The letter of November 30 also spoke of a draft at the rate of \$1.10 per box. Long denied that anything was said to him about keeping his account margined up, and further testified "that he drew many drafts on the defendants, . . . which were discounted with the plaintiff bank and paid by Snow and Company during the months of October, November, and December, 1894." We think that there was evidence warranting a finding that Long had authority to draw the drafts in question, and that the plaintiff discounted them on the faith of assurances made to it by the defendants that drafts drawn by Long would be accepted and paid.

It is clear that, in the absence of any statute to the contrary,

an oral acceptance of an existing bill of exchange is valid in this country, and that an indorsee of a bill so accepted may maintain an action on such acceptance against the acceptor. *Carnegie v. Morrison*, 2 Met. 381. *Exchange Bank v. Rice*, 98 Mass. 288. *Pierce v. Kittredge*, 115 Mass. 374. *Cook v. Baldwin*, 120 Mass. 317. *Coolidge v. Payson*, 2 Wheat. 66. *Townsley v. Sumrall*, 2 Pet. 170. *Russell v. Wiggin*, 2 Story, 213. *Spaulding v. Andrews*, 48 Penn. St. 411. *Bissell v. Lewis*, 4 Mich. 450. *Nelson v. First National Bank*, 48 Ill. 36. This was formerly the law in England, but it is now otherwise. It is clear also that for the breach of an oral or written promise to accept a non-existing bill an action will lie by the holder of a bill drawn pursuant to such promise and taken by him on the faith of it. *Boyce v. Edwards*, 4 Pet. 111, 122, 123. 1 Dan. Neg. Instr. § 559. 4 Am. & Eng. Encyc. of Law, (2d ed.) 238, 239. See cases *ubi supra*.

Whether an oral promise to accept a non-existing bill constitutes a virtual acceptance of it when drawn is a question on which the cases are not in entire accord, and which we have no occasion to consider here. See *Storer v. Logan*, 9 Mass. 55, 58. The ninth count, as has been observed already, is a count upon a promise to accept, and not upon an acceptance. We discover no error in the refusals to rule as requested.

Exceptions overruled.

GEORGE B. VAN NORMAN vs. GUSTAVUS E. GORDON.

Suffolk. November 9, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Foreign Judgment — Confession of Judgment under Warrant of Attorney — Action.

If a judgment of a court of record of another State in an action on a promissory note is entered upon a confession by an attorney of such a court under a warrant executed by the defendant, appointing A., "or any attorney of any court of record," his attorney to enter his appearance at any time after the note became due to waive the service of process, and confess a judgment in favor of

the plaintiff, but who was not otherwise authorized to appear for the defendant and confess judgment, and who was requested to appear by A., and whose appearance was really in the plaintiff's interest, there being no charge of fraud, or that judgment was entered for more than the note, or before the note was due, such judgment is entitled to full faith and credit here.

CONTRACT, upon a judgment of the Circuit Court for Milwaukee County in the State of Wisconsin, recovered on July 30, 1890, by the plaintiff against the defendant in an action on a promissory note for \$5,000, dated January 18, 1889, payable in that State to the plaintiff in one day from date, and signed by the defendant, who also executed at the same time an instrument, the material part of which is as follows: "Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint E. H. Bottum, Esq., or any attorney of any court of record, to be my true and lawful attorney irrevocably, for me and in my name, place, and stead, to enter my appearance before any court of record, in term time or in vacation, in any of the States or Territories of the United States, at any time after said note becomes due, to waive the service of process, and confess a judgment in favor of the said George B. Van Norman, or his assigns, upon the said note, for the above sum, or for as much as shall appear to be due, according to the tenor and effect of said note, and interest thereon at the rate of seven per cent per annum, to the day of the entry of said judgment, together with costs, and also to file a cognovit for the amount that may be so due, and to release all errors that may intervene in entering up said judgment, or in issuing the execution thereon, hereby ratifying and confirming all which my said attorney may do by virtue hereof." Annexed to the declaration was a copy of the record of the court in which the judgment was entered, which set out the "complaint," reciting the making and delivery of the note, and demanding judgment for the amount due, by "Winkler, Flanders, Smith, Bottum & Vilas, Plaintiff's Attorneys"; an answer as follows: "And now comes the above named defendant, by Ogden & Hunter, his attorneys, and by virtue of the power of attorney hereto annexed waives the service of process upon the said defendant, and enters his appearance herein, and confesses all the allegations in the plaintiff's complaint, and that there is due from the defendant to the

plaintiff on the note described therein the sum of . . . and hereby confesses and authorizes judgment for that amount, together with costs; and now here releases all errors which may intervene in entering up judgment hereon, and in issuing execution on such judgment," signed by "Ogden & Hunter, Defendant's Attorneys"; the note and warrant of attorney to confess judgment; the judgment declared on amounting to \$5,563.99; and an execution returned unsatisfied; and was authenticated by the clerk of the court, with the seal affixed.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The defendant signed the note on which suit was brought in Wisconsin. He also signed the warrant of attorney to confess judgment, on which judgment was confessed in Wisconsin. At the time he signed the note and warrant of attorney he was in and was a resident of that State. No personal service was made on the defendant in that suit. The defendant never authorized Ogden and Hunter, attorneys at law, to appear or act for him in the suit except as they may have been authorized so to do by the warrant of attorney to confess judgment. The judgment was entered as set forth in the declaration and the record thereto annexed, and has never been vacated or satisfied in any part. Ogden and Hunter, the attorneys who appeared and confessed judgment for the defendant, were attorneys of a court of record.

C. H. Sprague, for the plaintiff.

G. B. Upham, for the defendant.

MORTON, J. The question is whether the judgment which the plaintiff seeks to enforce is entitled to full faith and credit. The answer depends on whether the court which rendered it had jurisdiction to render such a judgment. *Board of Public Works v. Columbia College*, 17 Wall. 521. If it had, then the fact that it is a judgment by confession under a warrant of attorney is immaterial. Such judgments, when rendered by courts having jurisdiction of the cause and the parties, have all the qualities, incidents, and attributes of other judgments. *Teel v. Yost*, 128 N. Y. 387. See *Henry v. Estes*, 127 Mass. 474.

It does not appear from the facts that are agreed whether the laws of Wisconsin in force at the time authorized the entry of

judgments pursuant to powers of attorney to confess judgment, or if so, under what circumstances, or whether the court which rendered the judgment was a court of record or of general jurisdiction, or, if that is material, whether the defendant was a resident of Wisconsin when the judgment was rendered and the proceedings were instituted. No objection has been made, however, in respect to these matters, and the copy of the record, which has been submitted to us, shows that the court was a county court, with a clerk and seal, and was therefore a court of record, and may be presumed to have been a court of general jurisdiction. *Knapp v. Abell*, 10 Allen, 485, 489. *Pringle v. Woolworth*, 90 N. Y. 502.

And in view of the further considerations that every presumption is to be made in favor of the regularity of the proceedings, that it is not now contended that the court had not jurisdiction to enter judgment pursuant to a warrant of attorney to confess judgment, and that such proceedings are well known at common law and in many States, we think that it may also be presumed that the court had jurisdiction to enter judgment upon a warrant of attorney to confess judgment, and that the proceedings were regular, and according to the laws of Wisconsin. *McMahon v. Eagle Life Association*, 169 Mass. 539, and cases cited. *Wright v. Andrews*, 130 Mass. 149. *Stockwell v. McCracken*, 109 Mass. 84. *Bissell v. Wheelock*, 11 Cush. 277. *Galpin v. Page*, 18 Wall. 350.

The attorneys who appeared and acted for the defendant never were authorized to appear for him and confess judgment, except as they were authorized to do so by the warrant of attorney. It is agreed that they were attorneys of a court of record, — in Wisconsin we assume. We assume also that they were requested to appear by the attorney named in the warrant, or his firm, and that their appearance was really in the plaintiff's interest. That naturally would be so, and must have been expected when the power of attorney was given. There is no charge of fraud, or that judgment was entered for more than was due, or before the note was due, which would have been contrary to the power of attorney. The record shows that judgment was not entered till seventeen or eighteen months after the note was due. The note and warrant of attorney were

both signed in Wisconsin, where the defendant, and, as we infer, the plaintiff, resided at the time, and the note was payable in Wisconsin, where the plaintiff has his place of business, if not his home.

What was done in confessing judgment came within the terms of the warrant of attorney. Unless, therefore, the warrant of attorney purported to give an authority which it did not, or was for some reason invalid, we see no ground on which the judgment can be called in question. Assuming that we could refuse full faith to the judgment if we thought that there was an error of law in it, (see *contra*, *Laing v. Rigney*, 160 U. S. 531, *Carpenter v. Strange*, 141 U. S. 87, and *Richards v. Barlow*, 140 Mass. 218,) we find nothing which would justify such a conclusion. The warrant well might be held valid in Wisconsin, though adjudged invalid in another State. According to Mr. Dicey and Mr. Freeman, however, a warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign State. Dicey, *Confl. of Laws*, 377. *Freem. Judgments*, § 545.

Lord Blackburn went so far in one case as to suggest that "If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them." *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161. He was overruled, however, in *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686.

In *Richards v. Barlow*, *ubi supra*, no objection seems to have been taken because the warrant authorized an appearance "by any attorney of any court of record." See also *First National Bank v. Garland*, 109 Mich. 515; *Teel v. Yost*, 128 N. Y. 387. And in *Pirie v. Stern*, 97 Wis. 150, it was held that a power authorizing a confession of judgment "in any court of record" could be executed in any State in the Union, disapproving, as does also the court in Michigan in *First National Bank v. Garland*, *ubi supra*, the cases in Ohio and Tennessee on which the defendant relies. In *Blanck v. Medley*, 63 Ill. App. 211, it was held that a warrant of attorney authorizing "any attorney of any court of record" to confess judgment could be executed by an attorney in partnership with the attorney who signed the declaration for the holder of the note. See also *Mikeska v. Blum*, 63 Tex. 44.

We think, therefore, that the judgment must be regarded as rendered by consent of the defendant, that it was such a judgment as the court which rendered it had jurisdiction to render, and that it is entitled to full faith and credit.

Judgment for the plaintiff.

WILLIAM W. EDGAR vs. JOSEPH BRECK AND SONS
CORPORATION.

Suffolk. November 15, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Sale — Warranty — Law and Fact — Executory Contract — Statute of Frauds — Rescission — Principal and Agent — Damages — Evidence.

When an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete.

If an oral contract is made for the sale of goods to be delivered in the future, it is immaterial that at that time it was not evidenced by a memorandum in writing, but the statute of frauds can be satisfied later as effectually as at the time, and is satisfied by delivery of the goods.

The statement on a printed bill-head, sent with seeds alleged to have been sold previously with a warranty, that the seller does not warrant seeds can have no effect unless it leads to the inference that the old contract has been rescinded and a new one substituted by mutual agreement, but whether it is evidence of a rescission or not, it does not establish one, as matter of law, and does not exclude proof of warranty.

By declaring in set-off for the price of the goods after notice of an alleged warranty by the declaration in an action for breach of the warranty, the defendant affirms the sale, whatever it turns out to be, and must take it with its burden.

If bulbs are sold for the understood purpose of raising lilies for a certain market, the measure of damages for a breach of warranty as to their species is the difference between the value of the crop which the plaintiff raised and a crop of the warranted kind.

At the trial of an action for breach of an alleged warranty in the sale of lily bulbs known as longiflorum, those of an inferior variety having been delivered, no exception lies to the exclusion of evidence of a purchase of fifty of the inferior lilies at a retail store, the witness having been allowed to state the market value of these lilies.

CONTRACT, for breach of an alleged warranty in the sale of longiflorum lily bulbs. At the trial in the Superior Court, be-

fore *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. C. Ivy & S. H. Smith, (*J. Lowell* with them,) for the defendant.

C. W. Bartlett & E. R. Anderson, for the plaintiff.

HOLMES, J. This is an action for breach of a warranty that certain lily bulbs sold by the defendant to the plaintiff were of the kind known as *longiflorum*. The case has been tried and is here on exceptions.

The first exception to be considered is to a refusal to direct a verdict for the defendant. The plaintiff testified that the manager of the defendant's seed department spoke to him about supplying him with bulbs for the following Easter; that the plaintiff asked about the lilies being true to name, and that the manager replied that he would supply him with those true to name, whereupon the plaintiff gave him the order. Afterwards the bulbs were sent, and turned out to be in great part of an inferior variety (*Harrisii*), the bulb of which is not distinguishable from the *longiflorum*.

The defendant objected that the foregoing facts do not show anything importing a warranty, and, whatever their import, are no evidence of a warranty because the sale was executory, and that the plaintiff's only remedy on such a contract would be for failure to deliver the goods; that the agreement when made was within the statute of frauds, and did not become binding until the delivery of the bulbs, which were sent with a bill having a printed notice that the defendant sold no seeds with a warranty; and that there was no evidence of the agent's authority.

As to the first of these objections, we do not think it necessary to say more than that it was a question for the jury. With regard to that based upon the sale being executory, the answer is that when an executory contract is made for the sale of a described article the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete. It would work injustice to treat an essential term of the

contract as performed or waived at a time when the purchaser still is unable to tell whether it has been performed or not. *White v. Miller*, 71 N. Y. 118, 129. *Shaw v. Smith*, 45 Kans. 334, 338. See *Henshaw v. Robins*, 9 Met. 83.

The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing. The statute of frauds could be satisfied later as effectually as at the time. It was satisfied by delivery of the bulbs. The general printed warning on the bill-head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded and a new one substituted by mutual agreement. Even if the bill had been receipted it would not have excluded proof of the warranty, and whether it was evidence of a rescission or not it did not establish one as matter of law. *Atwater v. Clancy*, 107 Mass. 369. *Dunham v. Barnes*, 9 Allen, 352. *Hazard v. Loring*, 10 Cush. 267, 268. Perhaps *Lamb v. Crafts*, 12 Met. 353, would prove reconcilable with the later cases, if the instrument then before the court were set out. The case is not like *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 522, 523, where a series of bills were sent and received without objection, containing a term as to which, so far as appears, there had been no previous agreement, and which, as pointed out by the court, was a proposition in favor of the buyer of the goods. In that case there was nothing to prevent a presumption of the buyer's assent.

Finally, we should hesitate to say that a contract which was within the authority of an agent so long as it was an executory contract for the sale of a thing of a certain kind ceased to bind the principal after delivery, when it operated as a warranty that the thing was of that kind. But by declaring in set-off for the price of the bulbs after notice of the alleged warranty by the declaration, the defendant affirmed the sale, whatever it turned out to be, and must take it with its burden.

Several exceptions raise the question of the measure of damages. Evidence was admitted of the fair market value per hundred of longiflorum and of Harrisii lilies in the Easter market of 1894, and the jury were instructed that if the bulbs were sold for the understood purpose of raising lilies for that

market, the measure of damages would be the difference between the value of the crop which the plaintiff raised and a crop of longiflorums. This rule has the sanction of decisions elsewhere, and is within the principle of a recent decision by this court. *Johnston v. Faxon*, ante, 466. *Randall v. Raper*, El. Bl. & El. 84, 90. *Passinger v. Thorburn*, 84 N. Y. 684. *White v. Miller*, 71 N. Y. 118, 132, 133. *Wolcott v. Mount*, 7 Vroom, 262; *S. C.* 9 Vroom, 496.

An exception was taken to the exclusion of evidence of a purchase of fifty *Harrisii* lilies at a retail store, offered by the defendant to contradict the plaintiff's evidence. The witness had been allowed to state the market value of these lilies, and it is enough to say that the judge was warranted in regarding the sale as uninstructional with regard to growers' prices.

We have dealt with the questions argued and have examined the record. We are of opinion that the exceptions should be overruled.

Exceptions overruled.

ARCHIBALD S. NICKERSON vs. EDWARD RUSSELL & others.

Suffolk. November 15, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Contract of Employment — Partnership — Effect of Dissolution — Evidence.

If a person is hired for a year by a firm composed of three members, and the firm is dissolved during the year by the retirement of two of the members, but the business is continued by the other member in the same manner and at the same place, the remaining by such employee at work after the dissolution, although he knew that the retiring partners had withdrawn, and that but one of the three members was continuing the business, and his receiving from that member the weekly compensation which the three partners agreed that he should have from the three jointly cannot be said, as matter of law, to have been a surrender or abandonment by him of his joint contract with the three partners, or the making of a new contract with the one who continued to carry on the business.

In an action against the members of a partnership for an alleged breach of a contract to employ the plaintiff, no exception lies to the admission in evidence of a conversation between the plaintiff's wife and one of the defendants as to the terms or details of the contract, either just before the latter became a partner and when he was in the employ of the firm, or just after he became a partner,

it not appearing that the judge refused to limit the effect of the evidence, if the jury should find that the statement was made before the defendant became a partner.

CONTRACT, against Edward Russell, Edward B. Russell, and William L. Gage, formerly copartners as Edward Russell and Company, for an alleged breach of an agreement to employ the plaintiff. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff first entered the employment of Edward Russell and Company on July 1, 1889; that at that time the firm consisted of George H. Hull, Jr., and the defendants Edward Russell and Edward B. Russell; that the conversation relating to his original employment was between the plaintiff and Edward B. Russell; that in July, 1894, the firm was dissolved by the death of Hull, and a new firm was then constituted under the same name of Edward Russell and Company, consisting of the defendants Edward Russell and Edward B. Russell, and this firm continued to do business until January 1, 1895, at which time it was again dissolved, and a new firm was formed consisting of all three of the defendants; that the last named firm continued in business until March 19, 1897, when it was dissolved by the retirement of the defendant Gage; that notice of the retirement of the defendant Gage was duly published; that on March 31, 1897, the defendant Edward B. Russell retired from the firm, and notice of his retirement was duly published; that after the retirement of Edward B. Russell and until December 31, 1897, Edward Russell continued to do business alone under the firm name of Edward Russell and Company; that the firm of Edward Russell and Company did business as a mercantile agency, which also included a collection department; and that the plaintiff during his whole employment acted as manager of this collection department. The plaintiff testified that he knew of the retirement of Gage and of Edward B. Russell at the time each ceased to be a member of the firm; that in each case he continued to stay and perform the same duties that he performed before; that when Edward B. Russell left the firm, the defendant Edward Russell issued a general order to all the clerks in the office stating that another person had been appointed as general manager, and that they were all to obey this new manager; and that all

of the employees, including himself, did obey this new manager from that time. It also appeared that the reorganization of the firm from time to time did not, except as above stated, cause any change in the manner of doing its business, and that the business was carried on without interruption at the same place and under the same name during the whole period from July, 1889, to July, 1897. To prove the contract set forth in the declaration, the plaintiff testified that a few days after the 1st of January, 1897, he had a talk with the defendant Edward B. Russell, as a result of which it was agreed between them that he was to remain in the employ of the defendants for the coming year on the same terms as theretofore. He further testified that it was agreed between him and Russell that his compensation should be one half of the net profits of his department for each year, with a guaranty of one thousand dollars yearly if one half the net profits did not amount to that sum; that shortly after his original employment he was asked by the defendant Gage, who then and until January 1, 1895, was employed by the firm as bookkeeper, cashier, and canvasser, and at the end of each year furnished the plaintiff with a statement of the profits and attended to the adjustment thereof with the plaintiff, as to how he wished to draw his salary; that it was then agreed that he should receive weekly payments of nineteen dollars each; and that such payments were made each week until and including July 3, 1897, and settlements of the profits were made at the end of each year.

It was disputed whether the original hiring was yearly or at will. On this point the plaintiff offered the following evidence of a conversation between his wife, Hattie B. Nickerson, and the defendant Gage, at the office of Edward Russell and Company:

"Q. Did you have a talk at one time with Mr. Gage with reference to the time when your husband's compensation was due? A. I did.—Q. When was that talk? A. I am not quite sure whether it was the very last of December or the first of January. It was about the first of the year 1895.—Q. And what was the talk?" This question was objected to by the defendants, but was allowed to be put; and the defendants excepted. "A. Well, Mr. Gage told me there was nothing due Mr. Nickerson, as far as they knew, until after December 31."

The plaintiff testified that, as a part of the conversation in January, 1897, already referred to, between him and Edward B. Russell, the latter furnished him with a statement of the profits of the collection department of Edward Russell and Company of previous years, and that this statement was correct. It further appeared that for the first six months of 1897 the net profits of the collection department were \$1117.25. There was evidence tending to show that the receipts for the different months varied, and were usually somewhat greater during the last half of the year. The plaintiff testified that at the time of his alleged discharge the manager of Edward Russell and Company told him that they had decided to place the collection department in the hands of attorneys at law. There was also evidence tending to show that for the last six months of 1897 the work formerly done by the plaintiff was done by attorneys at law; that the nature and scope of the business done by the department was not changed; and that the net profits of the department during the last six months of 1897 were not greater than one thousand dollars.

The defendants requested the judge to direct the jury to return a verdict for the defendants; and also requested the following instructions, among others :

"1. The employment of service proved by the evidence was a service at will, and might be terminated by either party at will, upon notice to the other of one week.

"2. If the original contract of service was made between the plaintiff and a firm of persons different in whole or in part from the firm of Edward Russell and Company as constituted at the date of the writ, and if the plaintiff simply stayed in the service of the new firm when the change or changes therein were made without any conversation or agreement with the members thereof, and was paid the same compensation in the same way as theretofore, but if nothing was said as to his engagement by the new firm for any stated time, then the contract of service was thereafter at will.

"3. The most that the plaintiff is entitled to recover under any circumstances is what he would have received under the contract, if he had performed the services required by it, and the burden is upon him to show what such amount is.

"4. If the contract was originally with the firm, consisting of the three defendants, and if the firm was changed by the retirement of one or more of the partners, and the plaintiff continues with the new firm, performing the same services and accepting pay from them on the same terms as provided in the original contract, and he knows of, but makes no objection to the change, although nothing is said expressly renewing the contract with the new firm, then the original contract is terminated, and the retiring members of the old firm are no longer liable upon it."

The judge declined to rule as requested; and the defendants excepted.

The judge instructed the jury, among other things, as follows:

"I have been asked to say to you that the fact that the partnership was changed during that year would prevent him from recovering. I cannot say that to you absolutely. That is one of the things which you will take into account. If there was a partnership which hired him for a year, he could not prevent their dissolving, if they saw fit; he had no control over the partnership; but if the partnership did make that bargain with him for a year, he had a right to the benefit of his bargain whether they dissolved the partnership, or one partner dropped out and another partner came in. Of course, it would be a different partnership, but these three persons who constituted the partnership would be liable to him upon the contract, because they made it with him.

"Now, if there was any understanding when one of the partners dropped out, or both dropped out, and left the senior member alone standing there, if there was a mutual understanding that that old contract should be given up, and that he was to work simply for the new partnership independently of the old contract, then of course the contract was at an end, and he cannot recover now; that is, it was perfectly competent for him at any time to agree with the old partnership that the old contract should be given up, and that agreement may be determined, either by the words of the parties if there were any, and in the absence of words if there were actions of which the only reasonable interpretation could be that it was an understanding that the old contract was given up, you have a right to find it

was so. But if there was not anything of the kind, then he would have a right to stand on his original contract as against the old firm. . . .

"Now if you find there was this contract for a year with the old firm, and unless you find upon the evidence that the contract was abandoned by the parties, that is, that their acts were such that the parties had a right to understand that it was thrown up, then the contract stands, and if they discharged him without his consent he would be entitled to recover."

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

E. I. Smith, for the defendants.

E. R. Thayer, for the plaintiff.

BARKER, J. The hiring of the plaintiff for the year 1897 by the firm was a joint hiring by the individuals who composed the firm; and as the business was not closed by the voluntary dissolution of the firm, and was continued in the same manner and at the same place, the dissolution did not end the plaintiff's employment for the year. *Hughes v. Gross*, 166 Mass. 61. That employment continuing, the plaintiff remained bound to do the same things in reference to the business which was still carried on, and the defendants remained jointly bound to pay him therefor. Therefore his remaining at work after the dissolution, although he knew that the retiring partners had withdrawn, and that but one of the three members was continuing the business, and his receiving from that member the weekly compensation which the three had agreed the plaintiff should have from the three jointly cannot be said, as matter of law, to have been a surrender or abandonment by the plaintiff of his joint contract with the three defendants, or the making by him of a new contract with the one who continued to carry on the business. For these reasons, the instructions requested by the defendants were rightly refused, and those given, which left to the jury the question whether upon the dissolution there was a mutual understanding that the old contract should be considered at an end, were at least sufficiently favorable to the defendants. The same considerations show the fallacy of the defendants' arguments that the plaintiff's remaining at work and accepting pay from that one of his employers who continued to carry on the business was in law an assent on

the plaintiff's part to the assumption of all liability as to the plaintiff by the one who continued the business, and that thereafter there was merely a contract between those two, and terminable at the will of either.

The exception to the admission of the testimony as to the statements of the defendant Gage must be overruled. The date of that conversation could be found to have been either in December, 1894, or in January, 1895. If at the later date, Gage was a partner, and his statements were admissible as against all the defendants; if at the earlier date, his statements were at least admissible against himself. It does not appear that the court refused to limit the effect of the evidence, if the jury should find that the statement was made before Gage became a partner.

The objections that the action was prematurely brought, and that the rule of damages was wrongly stated, are not now insisted upon.

Exceptions overruled.

ELLEN M. HARDING vs. DAVID M. BIGGS.

Suffolk. November 15, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Eminent Domain — Location of Railroad — Trespass.

The D. & M. Railroad Company was chartered by St. 1846, c. 228, to construct a railroad, beginning at or near the depot of the O. C. Railroad at N. Village in D., and thence to some convenient point in D. or M. at or near the Upper Mills. On April 15, 1847, the company filed a written instrument and a plan purporting to be a location conformably to the statute. The written location described a line which it declared was the centre line for a single track, and which "commences at the centre between the track of the O. C. Railroad opposite the southerly corner of N. Depot in D." From this terminus the line was exactly described by definite courses and distances for a length of some 16,085 feet. The other terminus was not fixed otherwise than by the given courses and distances from the place of beginning; but the instrument stated that the described line conformed to the line described in the charter, which required that end of the railroad to be at some convenient point at or near the Upper Mills. The written location, after stating that the line described "is the centre line for a single track," stated further that "the width of line taken varies from

two to five rods, according as the embankments or excavations require." A., who owned a tract of land through which the railroad was built, brought an action of trespass against B. for removing in 1894 from land by the side of the railroad track a train load of gravel there delivered to him at a place where the railroad bordered on A.'s land. The court ruled that the location constituted a valid location two rods in width and no more, of which the centre line was defined, and found that no act was done by the defendant outside of the railroad location. *Held*, that there was a valid location two rods in width.

TORT, for breaking and entering the plaintiff's close and placing thereon certain gravel and sand. Trial in the Superior Court, before *Mason*, C. J., who found for the defendant, and found specially that no act of alleged trespass was committed upon the plaintiff's premises outside the two-rod location acquired by the original location of the railroad; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

G. P. Wardner, for the plaintiff.

C. F. Kittredge, for the defendant.

BARKER, J. The plaintiff owns a tract of land through which the Dorchester and Milton Branch Railroad Company, about fifty years ago, built its railroad. In May, 1894, the defendant removed from land by the side of the railroad track a train load of sand and gravel there delivered to him at a place where the railroad borders on the plaintiff's land, and this act is the alleged trespass. At the trial the plaintiff asked the court to rule that the location filed by the railroad company on April 15, 1847, was invalid, and that the company acquired no rights thereby, but had only such rights in the plaintiff's land as it had acquired by actual use and occupation. The court declined so to rule, and ruled that the location constituted a valid location two rods in width and no more, of which the centre line was defined, and found that no act was done by the defendant outside of the railroad location. The question for decision is whether the court should have ruled that the location was not a sufficient compliance with the statute, and that the railroad company acquired no rights thereby.

The railroad company was chartered by St. 1846, c. 228, with authority to locate, construct, and maintain a railroad, beginning at or near the depot of the Old Colony Railroad at Neponset Village in Dorchester, and thence to some convenient point in Dorchester or Milton, at or near the Upper Mills. See St.

1846, c. 228, §§ 1, 2, 4, 5. On April 15, 1847, the company filed a written instrument and a plan purporting to be a location of its railroad made in conformity with the statute. In the year 1848 the existence of the company was recognized by the Legislature in the passage of St. 1848, c. 180, authorizing the company to increase its capital stock. See also St. 1849, c. 180, § 5; St. 1851, c. 283; St. 1852, c. 124; St. 1854, c. 421, §§ 2, 5, 6; St. 1857, c. 162; St. 1861, c. 51; St. 1863, c. 205.

We are of opinion that as to the owners of land through which the railroad was built and has been maintained the location cannot now be held void, and that it gave to the company at least the right which the court below ruled that the location gave. It appears from the charter that there was a depot of the Old Colony Railroad at Neponset Village in Dorchester, near which depot was the track of that railroad. The written location describes a line which it declares is the centre line for a single track, and which "commences at the centre between the track of the Old Colony Railroad opposite the southerly corner of Neponset Depot in Dorchester." This terminus is fixed and defined by the two structures referred to then existing. From this terminus the line is exactly described by definite courses and distances for a length of some 16,085 feet. The other terminus is not fixed by the written instrument otherwise than by the given courses and distances from the place of beginning; but the instrument further states that the described line conforms to the line described in the charter, which required that end of the railroad to be at some convenient point at or near the Upper Mills. It is not contended that this terminus could not be identified by the plan as being in fact near the Upper Mills, nor that the written description of the location or the line laid down upon the plan does not coincide with the actual line of the railroad. The written location, after stating that the line described "is the centre line for a single track," states further that "the width of line taken varies from two to five rods, according as the embankments or excavations require." Whether this instrument was effectual to give the company any rights in land outside of the two-rod strip, and whether an owner of land outside of that strip, which land was used in making embankments and excavations, could be heard at this

late day to contend that as to the land used for such embankments and excavations the location gave the company no rights, there is now no occasion to consider, and upon those questions we express no opinion. The uncertainty which attaches to the taking outside that strip "as the embankments or excavations require" does not make it necessary to hold the instrument invalid or void, so far as it makes an appropriation of a defined and ascertained strip two rods in width.

None of the decisions cited by the plaintiff go to that extent. In *Hazen v. Boston & Maine Railroad*, 2 Gray, 574, the location was not held void, but the land occupied by the railroad was shown not to be within the location, and it was held that the defendant could not resort to extrinsic evidence to show that its intention was to have included the land. *Glover v. Boston*, 14 Gray, 282, was the case of the laying out of a highway, and there was neither in the laying out nor the plan any clear statement that the plaintiff's land was included in the layout. In *Wilson v. Lynn*, 119 Mass. 174, the plan was not referred to in the written instrument of taking, and did not appear to have been filed with it, and the land could not be identified by the description filed, although if the plan had been referred to as part of the description it might have been sufficient. In *Derby v. Framingham & Lowell Railroad*, 119 Mass. 516, the location was held void because the railroad company had no right to file it. In *Housatonic Railroad v. Lee & Hudson Railroad*, 118 Mass. 391, the location encroached without right upon land already devoted to a public use, and was also void because the location as filed did not state the width of the land taken or the boundaries, and the map on file was not referred to or made part of the location. In *Wamesit Power Co. v. Allen*, 120 Mass. 352, the taking was void because no written instrument was filed. And in *Lexington Print Works v. Canton*, 167 Mass. 341, the taking was void because in excess of the power vested in the officials who made and filed the instrument of taking. It is also to be noted that in none of these cases had any considerable number of years elapsed between the time when the right to take land had been exercised and that when the validity of the taking was questioned. While no doubt, as against one who claims under an exercise of the right of eminent domain, the

presumption is in favor of the owner of the land, that presumption in a case like the present is to be weighed with the presumption which comes from long acquiescence of the owner in uses of the land which can be justified only by a taking, the validity of which was at the time a question of importance to the Commonwealth, as well as to the landowners, and the validity of which seems not to have been questioned for nearly half a century.

Exceptions overruled.

WALTER A. GODDARD vs. D. H. MORRISSEY.

Suffolk. November 15, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Breach of Contract — Lord's Day — Evidence — Defence — Damages.

A written contract of hiring of a performer for "the week of June 28," which provides that he is to be "in the afterpiece if required . . . Train leaves at 1 P. M. Sunday," does not require performance on the Lord's day; and a journey on that day is not an essential step to the performance of the contract.

Where a person has entered into a written contract to employ certain performers who are to be competent and satisfactory to him, he cannot contend that the performers were not competent or satisfactory, if he refuses the service for another reason.

Evidence, in an action for breach of a contract to employ the plaintiff and two other performers for "the week of June 28," that the plaintiff was out of employment for the week, and that he engaged as his own employees persons whose services he was bound to furnish, justifies a finding for more than nominal damages.

CONTRACT, for breach of the following written agreement: "Boston, June. Mr. Wal't Goddard: Dear Sir,— You are booked at Lakeview Park, Lowell, week of June 28, as California Trio, yourself and two people, tenor and bass. Every one works in the afterpiece if required. Salary sixty dollars. Yours, D. H. Morrissey. P. S. Train leaves at 1 P. M. Sunday."

Trial in the Superior Court, without a jury, before *Hammond, J.*, who allowed a bill of exceptions in substance as follows.

This promise was written by one Chase, who signed the defendant's name to it and delivered it to the plaintiff with the knowledge and consent of the defendant, who ratified it on con-

dition that the two people should be competent and satisfactory to him. It appeared that this was all done on Monday, June 21, 1897. Within the same week and before June 28, the defendant informed the plaintiff that he could not obtain the premises at Lakeview Park, and therefore would not need the services of the plaintiff or the two others, and refused to accept their services when they were offered to him. Prior to the notice to the plaintiff that the defendant would not need his services, the plaintiff had engaged two others, one McKenna and one Ballentyne, as the two people designated in the contract, neither of whom had any conversation or agreement with the defendant personally at any time relative to the agreement. It was admitted that they were competent performers, and would have been satisfactory to the defendant. In consequence of the notice received by the plaintiff from the defendant, neither the plaintiff nor said two people presented themselves at the depot on Sunday, June 27, nor at Lakeview Park on June 28, although prior to and after notice they were at all times ready and willing and offered to go to Lakeview and to perform the services specified in the agreement. There was no evidence as to the amount of the individual share of the plaintiff in the sixty dollars mentioned in the contract, nor any evidence to show what would have accrued to him by its performance. The plaintiff was to be paid the sum of sixty dollars, and to make his own terms with the others. There was no evidence that the plaintiff had paid McKenna or Ballentyne anything, or that any demand was made upon him for such payment.

The plaintiff's evidence showed that he was ready and willing and offered to comply with the terms of the defendant's promise, and that he was out of employment during the week, and that one of his men lost some work.

The defendant requested the ruling that, upon all the evidence, the plaintiff could not recover. The judge refused so to rule, and found for the plaintiff in the sum of fifty dollars. The defendant alleged exceptions.

E. F. Collins, for the defendant.

F. W. Adams, for the plaintiff.

BARKER, J. 1. The defendant now contends that the contract called for services, part of which were to be rendered on

the Lord's day, and could not be enforced, and that, although the illegality was not pleaded nor called to the attention of the court below, it is apparent and can be taken advantage of here. But the contract is susceptible of a construction which makes it legal, and we have no doubt that this construction was given to it by the court below. The contract was a hiring for the "week of June 28," that is to say, for the secular days of that week. It does not appear that the plaintiff and those whom he was to furnish to work with himself were required to perform on the Lord's day. They were to be "in the afterpiece if required"; but the postscript, "Train leaves at 1 P. M. Sunday," implied that they were not to give a performance on the Lord's day. The defendant contends that the contract implied that they were to go from Boston to Lowell by the Sunday train. But a journey on the Lord's day was not an essential step to the performance of the contract. The plaintiff and his performers were no doubt to be at the Park in season to perform on Monday, but could go from Boston on a secular day. The postscript merely informed them of a train which they could take.

2. If the further stipulation, that the two people whom the plaintiff should furnish should be competent persons and satisfactory to the defendant, was made a part of the contract, it affords no ground of defence. The defendant did not base his refusal to perform the agreement upon the ground that either of the two persons was incompetent, or was not satisfactory to the defendant, but upon the ground that the defendant could not get the Park, and therefore did not need the services. If he had taken the ground that the persons engaged were incompetent or unsatisfactory, the plaintiff might have procured others. By refusing for other reasons to accept the services offered, the defendant lost the right to object that the persons engaged were not competent or satisfactory. See *Gilbert & Barker Manuf. Co. v. Butler*, 146 Mass. 82.

3. The defendant also contends that the damages should have been either the full amount which the plaintiff was to receive under the contract, or merely nominal. The full amount was sixty dollars, and the amount of the finding for the plaintiff was fifty dollars. The defendant was not harmed by a finding against himself of fifty dollars rather than of sixty. The evidence justi-

fied a finding for more than nominal damages. The plaintiff was out of employment for the week, and he engaged as his own employees persons whose services he was bound to furnish.

Exceptions overruled.

NELLIE J. T. ORR vs. HERBERT A. FULLER & others.

Suffolk. November 16, 1898. — March 2, 1899.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Mechanic's Lien — "Lot" of Land — Statute — Effect of Breach of Contract by Owner — Damages.

That the work was done and the materials were furnished in the erection of several houses under one contract with the owner of a tract of land, which has no visible divisions, warrants a finding, if not a ruling, that the whole tract is one lot, and that there is a mechanics' lien, under Pub. Sts. c. 191, § 1, upon the whole of it for the whole sum due.

When a contract for furnishing work and materials in the erection of a building is broken by the owner of the land, it is error, under Pub. Sts. c. 191, § 23, to allow the jury, at the trial of a petition to enforce a mechanics' lien, to find the fair value of the work and materials, if it exceeds the contract price less the work not done.

PETITION, against Herbert A. Fuller, Will S. Fuller, and Granville A. Fuller, to enforce a mechanic's lien under Pub. Sts. c. 191, for labor performed and materials furnished in the erection of nine dwelling-houses upon land in that part of Boston called Allston, by virtue of an oral contract with the respondent Herbert A. Fuller, on November 18 or 19, 1895. Annexed to the petition was an account upon a *quantum meruit*. Trial in the Superior Court, before *Braley, J.*, who allowed a bill of exceptions, in substance as follows.

The contract under which the lien was sought to be enforced was as follows. The petitioner agreed to do the plumbing for eight houses, according to plans and specifications, for \$2,750, and further agreed, as a part of the same contract, to do the plumbing at the same *pro rata* price on a ninth house which the respondent Herbert A. Fuller expected to build on another

lot of land, which he purchased subsequently, the whole contract price amounting to \$3,097.50.

The nine houses were built respectively upon the nine lots shown on a plan hereinafter mentioned.

At the time the contract was made, the legal and record title to a part of the land was in the respondent Will S. Fuller, but the ownership and equitable title of all the land in his name was in the respondent Herbert A. Fuller, who made the contract with the petitioner, and it was admitted that, for the purposes of the case, Herbert A. Fuller was the real owner of all the land.

The petitioner began to furnish labor and materials for plumbing the houses on or about November 25, 1895, and ceased to furnish labor and materials for the same on March 12, 1896.

The petitioner fully performed all the stipulations of her contract until the same was broken and annulled by Herbert A. Fuller early in March, 1896, and also furnished labor and materials on the houses of the value of \$199.97, which were extras not called for by the contract, and in addition thereto. The petitioner contended that she was entitled to maintain a lien for the amount of the *quantum meruit* account annexed to her petition.

The tract of land upon which the lien was sought to be enforced was situated at the corner of Aldie and Everett Streets. At the time of the making of the contract, the land was not enclosed, with the exception of a fence on the rear of the same parallel to Aldie Street, and several houses were in process of construction upon the different lots shown on two plans recorded on July 22 and November 4, 1895, respectively, and there was nothing else on the land to show the division into lots. The petitioner never saw the land until after the contract was made.

At the time of the making of the contract, several deeds and mortgages of the whole tract of land, and of several of the individual lots, as shown upon and according to the plans, had been made and duly recorded; and other conveyances and mortgages of all the different lots of land, as shown on the second plan, were made to different persons at different times between November 20, 1895, and March 12, 1896.

All of the premises described in the petition and shown on the second plan, except one lot for a valuable consideration, were conveyed to the respondent Granville A. Fuller, the father of the other respondents, by deed dated May 22, 1896, and duly recorded on June 1, 1896.

No separate account was kept by the petitioner of the labor performed on or the material furnished for each of the houses as distinct from the others, and the petitioner was unable to state what labor was performed or material furnished on any particular house.

At the time the petitioner ceased working under her contract, four only of the houses were completed, and the other five were in different stages of partial completion. The evidence showed that the cost of doing the work left unfinished by the petitioner, but called for by the contract, would be \$400. The respondent paid the petitioner \$1,300 on account.

During the progress of the work, on or about January 15, 1896, the petitioner's husband, who had charge of her affairs, went to the registry of deeds and personally examined certain mortgages that Herbert A. Fuller had given on several of the lots.

Against the objection of the respondents, the judge permitted the petitioner, in support of her *quantum meruit* account, to show the fair value of the work and materials that she had performed and furnished on all of the houses taken together at the time she ceased work thereon, namely, in March, 1896, ruling that she was not bound or limited by the contract price.

The respondents requested the judge to rule as follows:

"1. The petitioner, on all the evidence in the case, is not entitled to maintain a lien against the whole or any part of the property described in her statement or petition.

"2. If the jury find that Herbert A. Fuller made a contract with the petitioner, then the petitioner is limited by the contract price, and in no aspect of the case can she have a lien upon the property for more than the difference between said contract price and the amount of credits that should be applied to said contract, adding to said credits the fair market value of finishing the work according to the contract.

"3. In a mechanic's lien case, the petitioner can in no event recover more than the contract price.

"4. If the jury find that these houses were built on separate lots of land, a plan of which had been recorded in the registry of deeds and on some of which mortgages had been made before the date of the contract in this case, and if the petitioner is also unable to tell just how much labor and material were furnished on each of these distinct houses, she cannot maintain a lien upon any of the houses for any amount."

The judge declined to rule as requested, and, among other things, instructed the jury as follows:

"If Herbert A. Fuller broke and annulled this contract, then he cannot rely upon it as against the petitioner's claim, when the petitioner's claim for work and materials amounts to more than the sum for the entire contract, that is, amounts to more than \$3,097.50. . . .

"And I further instruct you that in this case, by reason of the annulling and breaking of the contract by Herbert A. Fuller, the petitioner, if entitled to recover at all, is entitled to recover the fair value of the work and materials, even though that sum exceeded \$3,097.50, from which fair value of labor and materials is to be deducted all just credits which ought to be given."

The jury answered issues submitted to them as follows:

"1. Q. What is the amount of the debt due the petitioner with all just credits given? A. \$2,017.30. — 2. Q. Are the premises described in the petition subject to a lien for the debt due the petitioner? A. Yes."

The jury stated, in response to a question from the judge, that the above sum of \$2,017.30 was composed of \$1,831.42 principal, and \$185.88 interest.

The respondents alleged exceptions.

F. Burke, for the respondents.

E. R. Thayer, for the petitioner.

HOLMES, J. The facts that the work was done and the materials were furnished under one contract with the owner of the whole tract, coupled with the absence of any visible divisions, warranted a finding, if not a ruling, that the whole tract was one lot, and that there was a lien upon the whole of it for the whole sum due, under Pub. Sts. c. 191, § 1. *Batchelder v. Rand*, 117 Mass. 176. See also *Lincoln v. Commonwealth*, 164

Mass. 368, 379; *Wellington v. Boston & Maine Railroad*, 164 Mass. 380, 381.

The contract was broken by the owner of the land, and the jury on that ground were allowed to find the fair value of the work and materials, even though it should exceed the contract price less the work not done, as they found that it did. We are of opinion that this was contrary to Pub. Sts. c. 191, § 23, which gives the plaintiff in a case like this "reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole." *Hale v. Johnson*, 6 Kans. 137. The question is not what personal remedy he might have against the other party to the contract, but to what extent it is proper to charge the land with a lien when it may have gone into the hands of strangers. Of course it would be possible to say that buyers must take notice of all possible consequences of the contract, but it seems more reasonable to fix the limit and the proportion from the only measure of which they can have notice,—the contract price. For that reason, no doubt, the statute has established a general rule.

The result is, that the exceptions must be sustained, but the petitioner may be able to avoid a new trial by consenting to a reduction.

Exceptions sustained.

INDEX.

ABATEMENT.

See **BASTARDY**, 1, 4; **TAX**, 1.

ACCEPTANCE.

See **BILL OF EXCHANGE**.

ACCOUNT.

See **MORTGAGE**, 2.

ACTION.

1. If the only issue at the trial of an action upon a policy of life insurance is whether or not the assured was in sound health at the date of the policy, and the evidence for each party, if believed, would warrant a verdict for such party, a pure question of fact, and not of law, is raised, and a request for a ruling that, upon the whole evidence, the plaintiff is not entitled to recover, is rightly refused. *Dorey v. Metropolitan Life Ins. Co.* 234.
2. A person who, while a passenger on a train running upon a branch line of a railroad about ten miles in length, and consisting of freight cars and a combination car in which he is riding, one part of which is designed for passengers and another part for baggage, is injured by such jerking and jolting of the car as is ordinarily incident to a train of this kind, and who is familiar with the nature of the business on this line and the manner of conducting it, cannot maintain an action against the railroad corporation for his injury. *Olds v. New York, New Haven, & Hartford Railroad*, 73.
3. A street car conductor started to shift the trolley rope on a car which had been run on to the transfer table in a car-house, which was moved by electric power operated by another employee. The conductor was walking on the floor of the car-house, and when he was half way round to the middle of the car the other employee started the table. The conductor called out to him to wait, as a spring attached to the roof of the car was caught,

causing the conductor to walk back the other way, and while so doing, and looking up and trying to free the spring, a track rail, which was part of the fittings of the table, and which projected about eighteen inches from it over the car-house floor, with a space of about an inch and a half between the bottom of the rail and the floor, and which was in motion with the table, caught the conductor's foot, and he was injured. He had been in the habit of using the table several times a month for more than a year, besides having an experience of several years with quite similar tables. *Held*, that he could not maintain an action against the corporation for his injury. *Whelton v. West End Street Railway*, 555.

4. An action at common law cannot be maintained against an employer for personal injuries occasioned to a workman by an explosion caused by the fumes of naphtha, which was being used, in obedience to an order given by the defendant's superintendent, upon cotton waste in cleaning the inside of a tank, coming in contact with the flame of a lamp which the plaintiff was holding near the tank to enable the men within the tank to see, it not appearing that the naphtha was provided for use in cleaning the tank, although it had been used for cleaning machines. *Meehan v. Speirs Manuf. Co.* 375.

See APPEAL, 5 ; BILL OF EXCHANGE, 2 ; CONTRACT, 1, 6 ; DECEIT ; DECLARATION ; EMPLOYERS' LIABILITY ACT, 5 ; ESTOPPEL ; EVICTION ; FORCIBLE ENTRY AND DETAINER ; FOREIGN CORPORATION, 1, 2, 4-6 ; HIGHWAY, 2, 3, 5 ; HORSE ; INJUNCTION ; INSURANCE, 6 ; LANDLORD AND TENANT, 2, 3 ; MARRIED WOMAN ; MASTER AND SERVANT, 1, 4-8 ; MONEY HAD AND RECEIVED ; NEGLIGENCE, 11, 12 ; PASSENGER, 2 ; PRINCIPAL AND AGENT, 1 ; RAILROAD, 2 ; SEWER, 1, 3, 4 ; TAX, 3 ; USE AND OCCUPATION.

ADMINISTRATOR.

See CONTRACT, 1 ; ESTATES OF PERSONS DECEASED, 2 ; ESTOPPEL, 2 ; EVIDENCE, 2 ; GUARDIAN AND WARD, 2, 3 ; INSURANCE, 2.

ADMISSIONS.

1. *It seems* that, if a writing is put in merely as an admission, it may be explained by the writer, even though the explanation contradict the proper construction of the written words. *Honsuckle v. Ruffin*, 420.
2. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, there was evidence of the plaintiff's mother that the defendant said to her, "I do not want to tell you to sue me, but if it was me I should sue. . . . My machines are all insured, and you will have to sue me to get at the insurance company." *Held*, that the sentence in which he indicated an opinion that he was liable was in the nature of an admission which was evidence against him ; but the weight of it might be affected by the fact, if it was a fact, that he was insured. *Ellis v. Pierce*, 220.

3. Where, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, the testimony of the plaintiff was not clear in support of the contention that the defendant failed to perform the duty of keeping the machinery in a condition safe for his employees to work upon it, but some things in his testimony had a slight tendency in that direction, the court said that, considering this testimony in connection with certain admissions of the defendant tending to show his liability, it was of opinion that the case was rightly submitted to the jury. *Ellis v. Pierce*, 220.

See NEGLIGENCE, 11; TRIAL, 1.

ADULTERY.

See DIVORCE.

ADVERSE POSSESSION.

1. The effect of an open adverse possession of land under a claim of right for twenty years is not affected by a sale and conveyance of the premises for taxes during that time, followed by a quitclaim of the tax title to the disseisee before St. 1891, c. 354. *Harrison v. Dolan*, 395.
2. The adverse possession of a grantee of one tenant in common of land may be tacked to that of the latter before the conveyance, and if together they equal twenty years the defence of title by prescription to a petition for partition by the other cotenant is established. *Frost v. Courtis*, 401.

See AMENDMENT ; PRESCRIPTION.

AFFIDAVIT.

See EVIDENCE, 10.

AGENT.

See PRINCIPAL AND AGENT.

ALIEN.

See CITY, 4.

ALTERATION OF INSTRUMENTS.

See EVIDENCE, 4.

AMENDMENT.

After a verdict had been directed for the respondents in a petition for partition of two parcels of land in the Superior Court, the case was reported to this court upon the terms that, if the ruling was right, judgment was to

be entered on the verdict, and if the ruling was wrong, the verdict was to be set aside and by agreement of parties a new trial granted to try the issue of title by prescription of one of the respondents. A rescript of this court directed that the verdict should be set aside and the case stand for trial on the issue whether that respondent had acquired a title by prescription. At the second trial in the Superior Court, the respondents were allowed to amend the answer, setting up as a defence that the petitioner was estopped from claiming any interest in one of the parcels adverse to the other respondent or any person claiming under him. *Held*, that the court had power to allow the amendment. *Frost v. Courtis*, 401.

See BENEFICIARY ASSOCIATION; EQUITY, 9.

ANIMAL.

See CRUELTY TO ANIMALS; DOG; HORSE.

ANSWER.

The answer, signed by attorney in an action against a constable for the conversion of goods, is not admissible in evidence in a subsequent action, brought for the benefit of the same plaintiff against a surety upon the constable's bond, to enforce payment of the judgment recovered in the former action. *Farr v. Rouillard*, 303.

See AMENDMENT; CERTIORARI, 1; EXCEPTIONS, 6; RAILROAD, 2.

APPEAL.

1. A plaintiff can appeal to the Superior Court from the judgment of a district court in his favor, if the judgment is less than the amount claimed in the declaration. *Kingsley v. Delano*, 37.
2. A judgment of the Superior Court appealed from must be affirmed, if there is no matter of law apparent on the record which this court can consider under the appeal. *Cobb v. Hale*, 387.
3. Upon appeal from a decree of a justice of the Superior Court sitting in equity on questions of fact arising upon oral testimony heard before him, his decision will not be reversed unless it is plainly wrong. *Dickinson v. Todd*, 183.
4. Where, on an appeal from a decree of the Superior Court after a hearing on a bill in equity praying that the defendant be enjoined from maintaining a fence across a certain street and in front of the premises of the plaintiff, the evidence is not reported, that part of the decree which is not justified by the record will be stricken out; and the contention of the defendant that in any event the decree is wrong because the bill states the frontage of the defendant's lot to be two hundred and seventy-four feet, while the decree seems to fix it at one hundred and seventy-four, cannot avail, because, the evidence not being reported, it is impossible to tell which is correct. If the error, if there be any, be merely clerical, it can be corrected. *Tuleja v. Beaurais*, 139.

5. If, where a trustee appeals from orders of the Superior Court overruling his motion that he be discharged on his answer and requiring him to answer certain interrogatories propounded by the plaintiff, it does not appear that the action against the principal defendant has been tried, the appeal is prematurely entered, and must be dismissed. *Brennan v. McInnis*, 247.

See TAX, 1; TRUST AND TRUSTEE, 3.

APPEARANCE.

See SET-OFF.

ARREST.

See DISCHARGE.

ARSON.

See VARIANCE.

ASSAULT AND BATTERY.

A trespasser is liable for all the consequences of an unlawful battery of the person, although the consequences are enhanced by abnormal weakness. *Spade v. Lynn & Boston Railroad*, 488.

See MARRIED WOMAN.

ASSESSMENT.

See CERTIORARI; CONSTITUTIONAL LAW, 2; INSURANCE, 1.

ASSESSOR.

See GUARDIAN AND WARD, 1; TAX, 1.

ASSIGNEE IN INSOLVENCY.

See EVIDENCE, 10, 11; MORTGAGE, 1.

ASSIGNMENT.

See EXCEPTIONS, 13; FOREIGN CORPORATION, 6; SET-OFF;
TRUSTEE PROCESS.

ATTACHMENT.

See TRUSTEE PROCESS.

ATTORNEY AND CLIENT.

See GRADE CROSSING, 8.

AUDITOR.

A judge, sitting without a jury, is not bound by the report of an auditor, but has a right to find according to his own belief upon all the evidence. *Johnson v. Kimball*, 398.

See GRADE CROSSING, 2, 8; REPORT.

BANK.

1. The purchase of negotiable paper by a bank is as clearly within its legitimate powers as is the collection of such paper by the bank as an agent. *Taft v. Quinnigamond National Bank*, 363.
2. In an action on a check drawn on a bank in another State and deposited by the plaintiff, to whom it was payable, in the defendant bank in W. in this Commonwealth on August 2, 1897, and credited to him upon deposit and afterwards charged back by the bank on his pass-book on November 19, 1897, there was no evidence of usage or custom, or that the defendant informed its customers by notices upon its pass-books or deposit slips or otherwise, that it accepted deposits of commercial paper only as an agent for collection, or that such was its general arrangement with the plaintiff, or that he understood that it was the arrangement ordinarily made by the defendant with its depositors. When the check was deposited, the plaintiff asked the teller when he would hear from it, if not paid by the maker, and was told that it would be three or four days. From September 8, when the defendant first informed the plaintiff of difficulty in collecting the check, until November 19, there were frequent interviews between the plaintiff and the defendant's officers, none of which were decisive in favor of either party; and in this interval the plaintiff knew of the defendant's efforts to find the check, which the drawee never admitted receiving, and to induce the maker to pay it or give a duplicate, and the plaintiff's checks were honored by the defendant at times when his account would have been insufficient to meet them if the amount of the lost check had been charged back; and on October 23 the pass-book was written up without charging back this amount. In the course of mail the defendant's Boston correspondent should have received on August 21, at the latest, notice from the drawee of the reception of the check. *Held*, that the defendant became the purchaser of the check. *Ibid*.

See BILL OF EXCHANGE; TRUST AND TRUSTEE, 8.

BANKRUPTCY.

The act of Congress of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," so far super-

sedes the insolvency laws of this Commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after said date. *Parmenter Manuf. Co. v. Hamilton*, 178.

BASTARDY.

1. A plea to a complaint under the bastardy act, Pub. Sts. c. 85, setting out enough to show that no cause of action exists under the statute, is a plea in bar, and not in abatement. *Davis v. Carpenter*, 167.
2. If a girl eighteen years old, living with her parents in another State, is told by her father that he can no longer support her and that she must find a home elsewhere, and, with his assent and assistance, goes from her home by previous arrangement, with all her personal effects, to the house in this Commonwealth of a person who is willing to receive her into his family as his daughter, with the intention of making it her home and of not returning to her former home, she may maintain a bastardy complaint made on the day of her arrival here, although the child was begotten in the other State, where the respondent resided, and was also born there while she was visiting her father during his illness, having returned there for such visit nine days after her arrival here, and, by reason of her confinement, remaining there about seven weeks, and then returning and residing here continuously until the trial of the complaint. *Ibid.*
3. At the trial of a complaint for bastardy by a girl eighteen years old, who left her home in another State, where the child was begotten and the respondent resided, having been told by her father that he could no longer support her and that she must earn her own living, and went to the house in this Commonwealth of B., who was willing to give her a home, and made the complaint here, the judge admitted evidence of the complainant that she had previously "made her own trades" for work she had done and "herself received the pay therefor"; that she told the respondent of her condition, and he left the town soon afterwards; and the conversation between her and her father as to his inability to support her and the necessity of her making her home elsewhere and taking care of herself; also the conversation upon her arrival at B.'s house as to his willingness to receive her as his daughter, and as to her father resigning control of her; and her testimony that since her arrival her home had been at the house of B., who had supported her since then, and her father had done nothing for her support. *Held*, that no error appeared. *Ibid.*
4. The respondent in a bastardy complaint is not entitled to try anew, before a jury, upon the plea of not guilty, the questions which have been raised by pleas in abatement and in bar, and tried before the judge without a jury, and evidence offered for that purpose is rightly excluded. *Ibid.*

BENEFICIARY ASSOCIATION.

1. A beneficiary association, organized under Pub. Sts. c. 115, which has reserved the power to amend its by-laws without limitation or restriction,
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may so amend them as to affect the right of a member to future benefits under a disability existing when the amendment is made. *Pain v. Société St. Jean Baptiste*, 319.

2. A by-law of a beneficiary association, providing that every member should have a right to five dollars a week if he became disabled during a period not exceeding thirteen weeks in each year, was amended so as to provide that "when a member has received thirty-nine weeks of sick benefits . . . he shall not hereafter receive more than one dollar per week, instead of five dollars, for thirteen weeks of each year," during a period of five years. *Held*, that the amended by-law applied to a member who, at the time of its adoption, was under a disability, and had received payment of benefits for thirty-nine weeks. *Ibid*.

BILL OF EXCHANGE.

1. In an action by a bank upon an alleged promise to accept and pay drafts drawn by A. on the defendant and discounted by the plaintiff, two letters written by the defendant to A., which were shown by him to the plaintiff's cashier, and which conferred implied, if not express, authority upon A. to draw on the defendant for fruit which he was to ship to him, were put in evidence. There was also evidence tending to show that the defendant told the plaintiff's cashier that A. was to buy and ship fruit for his house, that he had authority to draw on the house, and that his drafts would be honored. The defendant testified that there was an agreement as to fruit from a certain grove that he would advance a sum named per box while A. should keep his account "margined up." One of the letters to A. also spoke of a draft at that rate per box. A. denied that anything was said to him about keeping his account "margined up," and testified that he drew many drafts on the defendant which were discounted by the plaintiff during certain months. *Held*, that there was evidence warranting a finding that A. had authority to draw the drafts in question, and that the plaintiff discounted them on the faith of assurances made to it by the defendant that drafts drawn by A. would be accepted and paid. *Putnam National Bank v. Snow*, 569.
2. For the breach of an oral or written promise to accept a non-existing bill of exchange an action will lie by the holder of a bill drawn pursuant to such promise, and taken by him on the faith of it. *Ibid*.

BOARD OF HEALTH.

See CITY, 1-4.

BOND.

1. A bond given by a constable in a city other than Boston to the treasurer thereof is, if it was voluntarily executed and contains nothing in the condition contrary to law, a valid bond at common law. *Farr v. Rouillard*, 303.

2. Where it is plain that the obligor in a common law bond given by a constable in a city other than Boston to the treasurer thereof intended to comply with the statute, and therefore, by implication, it was taken in trust for the benefit of the same persons who could take advantage of a bond in the statutory form, the damages will be measured by the interest of the *cestui que trust*, not by that of the obligee. *Farr v. Rouillard*, 303.
3. It cannot be contended that a bond conditioned to indemnify the plaintiff for all loss sustained by reason of his becoming bail for the principal obligor cannot be affected by subsequent parol agreements of the parties, but must be considered to remain in force until released by an instrument of equal dignity and solemnity. *Tuson v. Crosby*, 478.
4. An action was brought upon a bond of indemnity against loss resulting from insolvency of debtors "on total gross sales . . . amounting to \$120,000 or less . . . to be made" between June 15, 1896, and June 14, 1897, when the bond was to expire. By a rider "covered losses, occurring after payment of premium, on sales and shipments made" from April 1, 1896, to June 15, 1896, might be proved. By the fourth condition, "notification of claims must be delivered to this company . . . within ten days after" information by the indemnified of the debtor's insolvency and received at the company's central office at S. during the term of the bond, otherwise to be barred. By another condition there was to be a final statement of all claims filed according to the fourth condition, and it was to be received at the office within thirty days after the expiration of the bond, otherwise all claims to be barred; and claims were to be adjusted within sixty days after receipt of such final statement, the amount due to be then payable. By still another condition, "In case this bond is renewed, . . . loss on sales covered . . . resulting after said date of expiration upon shipments made during the term of this bond, may be proven, . . . subject also to the terms and conditions of such renewal." Then followed a similar provision in case this bond was a renewal. The loss in respect of which the plaintiff claimed indemnity was upon sales made within the time limited by the instrument, but the insolvency causing the loss in each case occurred after June 14, 1897. *Held*, on demurrer to the declaration, that the bond did not cover the loss. *Hogg v. American Credit Indemnity Co.* 127.

See ANSWER; DAMAGES, 4; EVIDENCE, 2, 3, 9; EXECUTOR; FALSE REPRESENTATIONS, 1-3; GUARDIAN AND WARD; PRINCIPAL AND AGENT, 5.

BOSTON.

See CERTIORARI, 2; CONSTITUTIONAL LAW, 2.

BROKER.

See EQUITY, 1.

BUILDINGS.

See EVIDENCE, 7, 8; FRAUDS, STATUTE OF, 2; INSURANCE, 5; LANDLORD AND TENANT, 2, 8; LEASE; MECHANIC'S LIEN, 2-5; PRINCIPAL AND AGENT, 8.

BY-LAW.

See BENEFICIARY ASSOCIATION; CITY, 3, 5; EVIDENCE, 1; SIDEWALK.

CERTIORARI.

1. Where a case is set down for hearing on a petition for a writ of certiorari to quash a sewer assessment and on the answer, all material facts well alleged in the answer and all material facts well alleged in the petition which are not denied or put in issue by the answer, if these facts are consistent with the record of the respondent, must be taken to be true. *Weed v. Boston*, 28.
2. Certiorari is a proper remedy to try the question whether assessments made under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," are invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute. *Ibid.*

CHECK.

See BANK, 2; TRUST AND TRUSTEE, 8.

CITY.

1. The St. 1878, c. 21, (Pub. Sts. c. 80, § 15,) relating to the office of city physician, is confined to cities which have accepted St. 1877, c. 133, or the corresponding provisions of the Public Statutes, relating to the board of health in cities. *Attorney General v. McCabe*, 417.
2. In the absence of statutory authority, the city council of a city cannot delegate to the mayor its power to appoint a board of health. *Ibid.*
3. A person elected, under St. 1873, c. 246, § 13, city physician of Gloucester, which city is not shown to have accepted St. 1877, c. 133, relating to the board of health in cities, appears to have been duly elected, but he is not *ex officio* a member of the board of health under the provisions of an ordinance which purports to delegate to the mayor the power of the city council to appoint a board of health. *Ibid.*
4. An alien is eligible to the office of city physician of a city, if he is not *ex officio* a member of the board of health. *Ibid.*
5. An ordinance of the city of Worcester, which provides that "No person shall carry on the business of collecting, storing, or dealing in old rags, old papers, or other such refuse material, in any building within a circle the radius of which is two miles from the intersection of the south line of Front Street and the east line of Main Street, unless he is duly licensed

therefor by the board of aldermen, for which license, if granted, no fee shall be charged," is valid. *Commonwealth v. Hubley*, 58.

6. The appropriation of money made on the recommendation of the mayor of the city of Holyoke by the board of aldermen from the contingent fund to defray the expenses of a committee composed of the mayor and certain members of the board of aldermen to attend a convention of American municipalities in another State, where subjects pertaining to the administration of cities are to be discussed and which the city of Holyoke has received an invitation to attend, is authorized neither by the general laws nor by the charter of the city; and the city treasurer may be enjoined from the payment of the money. *Waters v. Bonvouloir*, 286.

See BOND, 1, 2; CERTIORARI, 2; CONSTITUTIONAL LAW, 3, 4; EASEMENT, 2; EVIDENCE, 1, 19, 20; GRADE CROSSING, 1; HIGHWAY, 3; SEWER; SIDEWALK.

CLOUD ON TITLE.

See SPECIFIC PERFORMANCE.

COMMISSIONER OF CORPORATIONS.

See INSOLVENT DEBTOR, 2.

COMMON LAW.

See BOND, 1, 2; FALSE PRETENCES, 5.

COMMONWEALTH.

See GRADE CROSSING, 3; HIGHWAY, 1

COMPLAINT.

See BASTARDY; CRUELTY TO ANIMALS; FORFEITURE;
RECOGNIZANCE; SIDEWALK.

COMPROMISE.

Where there is no dispute or uncertainty about the amount of a debt, the rule in regard to the compromise of disputed claims and the settlement of unliquidated and doubtful claims does not apply. *Specialty Glass Co. v. Daley*, 460.

CONDITION.

See BOND, 1, 3; FALSE PRETENCES, 1; INSURANCE, 5; WAIVER.

CONFLICT OF LAWS.

See FALSE PRETENCES, 5, 8.

CONSTABLE.

See ANSWER; BOND, 1, 2; SIDEWALK.

CONSTITUTIONAL LAW.

1. On a petition for a writ of error to reverse a sentence of the Superior Court, by which the petitioner was confined in the State prison, it appeared that the offences of which he was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced on May 28, 1896, under St. 1895, c. 504, entitled "An Act relative to sentences to the State prison," which took effect on January 1, 1896. As the law stood when the offence was committed, the petitioner was entitled to a deduction for good behavior, and to a permit to be at liberty for the time thus deducted on such terms as the prison commissioners should fix and subject to revocation by them. *Held*, that, as to the petitioner, the statute of 1895 was void as an *ex post facto* law, and that the case must be remanded to the Superior Court for sentence, according to the law as it was before the passage of the statute. *Murphy v. Commonwealth*, 264.
2. Where, under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," a sewer has been laid out in a strip of land which, though called a street, is not a street but is private property, as are the lots of land bordering thereon, the method of laying assessments on such lots prescribed by the statute is unreasonable and disproportionate; and the statute in this respect is unconstitutional. *Weed v. Boston*, 28.
3. The St. 1897, c. 271, entitled "An Act to further regulate the transportation of spirituous and intoxicating liquors into no-license cities and towns," is well within the right of the State under the police power to legislate as to intoxicating or spirituous liquor, and is constitutional. *Commonwealth v. Intoxicating Liquors*, 311.
4. Section 2 of St. 1897, c. 487, which declares that the provisions of Pub. Sts. c. 100, relating to the seizure and forfeiture of intoxicating liquors shall apply to St. 1897, c. 271, regulating the transportation of intoxicating liquors into no-license cities and towns, is to be construed as making the general scheme of enforcing forfeiture found in Pub. Sts. c. 100, §§ 30-46 inclusive, applicable to the forfeitures under St. 1897, c. 271, with such modifications as required by the ground of forfeiture, and as thus interpreted is sufficiently definite, and is constitutional. *Ibid*.

See CERTIORARI, 2; SENTENCE.

CONTEMPT.

1. A corporation may be held liable for a criminal contempt in publishing an article in a newspaper which is printed and circulated in the place

- where a trial is had pending the trial, and which concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial. *Telegram Newspaper Co. v. Commonwealth*, 294.
2. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion can institute proceedings for contempt. *Ibid.*
 3. It may be rightly adjudged a contempt of court for a newspaper to publish statements of facts, evidence of which was not competent at the trial of a cause and was not introduced at the trial thereof, if they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and their natural and probable effect was improperly to influence the court and jury in the determination of the cause. *Ibid.*
 4. The proper method of collecting a fine imposed upon a corporation for contempt is by levy of an execution, to be issued by the court. *Ibid.*

CONTINUANCE.

See POOR DEBTOR.

CONTRACT.

I. *Making.*

1. In order to recover against an administrator for payments or services in his intestate's life, the latter's consent or ratification or some arrangement with him must be shown, and to recover for the funeral expenses of the intestate's wife and for services rendered to her it must be shown that they were incurred or rendered upon the credit of the intestate, or with the intent to collect the expenses or for the services from him or his estate, or that he promised to pay the plaintiff. *Johnson v. Kimball*, 398.
2. If A. chooses to do a service to B.'s advantage, which A. means to be gratuitous and which B. knows nothing about, the law does not force a complete or inchoate contract upon A. without the consent of either party, even in a case where B. is relieved of a duty and A. has the power to bind him if he chooses. *Ibid.*

See EVIDENCE, 7; GUARDIAN AND WARD, 2; PRINCIPAL AND AGENT, 1-3;
PROMISSORY NOTE.

II. *Consideration.*

3. An agreement to accept a part of a debt in payment for the whole is not binding unless it is made by an instrument under seal. *Specialty Glass Co. v. Daley*, 460.

See COMPROMISE; POOR DEBTOR, 1.

III. *Validity.*

See CONTRACT, 7; FALSE PRETENCES, 2; FRAUDS, STATUTE OF; MONEY HAD AND RECEIVED; SALE, 2.

IV. *Construction.*

4. An agreement, by the terms of which a weaver in a cotton mill is to be paid a certain sum for weaving a described cut of cloth of the first quality and half the amount for a cut of the second quality, the quality to be determined by the superintendent of the mill, is to be taken to refer only to a difference of quality for which the weaver is responsible, and is sufficiently certain to satisfy St. 1894, c. 508, § 55. *Gallagher v. Hathaway Manuf. Corp.* 230.
5. An agreement is express none the less that it is expressed by conduct, and not by words. *Ibid.*
6. The deduction by a manufacturing corporation, under an agreement between it and a weaver in its employ, as a fine under St. 1894, c. 508, from his weekly wages of a sum for imperfection in his work of the previous week for which he was paid the full price as for work of the first quality, is not a violation of § 51, as to the weekly payment of wages by such a corporation to its employees; and if he sues for the amount so deducted, the corporation is entitled to judgment under a general denial, or to recover in set-off. *Ibid.*

See DEED, 3; RECOGNIZANCE; SALE, 1, 3.

V. *Performance and Breach.*

7. A written contract of hiring of a performer for "the week of June 28," which provides that he is to be "in the afterpiece if required . . . Train leaves at 1 P. M. Sunday," does not require performance on the Lord's day; and a journey on that day is not an essential step to the performance of the contract. *Goddard v. Morrissey*, 594.
8. Where a person has entered into a written contract to employ certain performers who are to be competent and satisfactory to him, he cannot contend that the performers were not competent or satisfactory, if he refuses the service for another reason. *Ibid.*

See DAMAGES, 1, 2; FALSE PRETENCES, 1; MECHANIC'S LIEN, 2, 5.

VI. *Rescission.*

9. If a person is hired for a year by a firm composed of three members, and the firm is dissolved during the year by the retirement of two of the members, but the business is continued by the other member in the same manner and at the same place, the remaining by such employee at work after the dissolution, although he knew that the retiring partners had withdrawn, and that but one of the three members was continuing the business, and his receiving from that member the weekly compensation which the three partners agreed that he should have from the three jointly can-

not be said, as matter of law, to have been a surrender or abandonment by him of his joint contract with the three partners, or the making of a new contract with the one who continued to carry on the business. *Nickerson v. Russell*, 584.

See BOND, 3; EQUITY, 1; PRINCIPAL AND AGENT, 4; SALE, 3.

CONTRIBUTORY NEGLIGENCE.

See ACTION, 3; EMPLOYERS' LIABILITY ACT, 3, 8, 9; HIGHWAY, 5; MASTER AND SERVANT, 2, 4, 8-10; NEGLIGENCE, 3, 6-8, 13, 14; SEWER, 1-3; TRIAL, 5.

CONVERSION.

See ANSWER; EVIDENCE, 21; EXCEPTIONS, 19.

CORPORATION.

See BANK; BENEFICIARY ASSOCIATION; CONTEMPT; CONTRACT, 6; COVENANT; EQUITY, 9; ESTOPPEL, 2; EVIDENCE, 8, 18; EXCEPTIONS, 18; FALSE PRETENCES, 1, 3, 7, 8; FALSE REPRESENTATIONS, 1, 4, 5; FOREIGN CORPORATION; FOREIGN JUDGMENT, 1; INSURANCE, 5; MONEY HAD AND RECEIVED; PRINCIPAL AND AGENT, 5; TAX, 1.

COSTS.

See EQUITY, 7.

COVENANT.

A corporation issued a certificate that a person was a shareholder therein, containing a covenant to pay him one hundred dollars a share, five years from date, and stating that the sum was "payable in the manner and upon the conditions set forth in the articles of association and by-laws and terms and conditions printed" thereon. The statute of incorporation stated the final purpose of the corporation to be that "of accumulating a fund to be returned to its members . . . when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association," one of which provided that "whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be cancelled," and he "shall be entitled to receive . . . the par value of the shares named, . . . and no more." *Held*, in an action upon the covenant, that the covenant was not absolute, and that evidence that there were withdrawals of other members on file, that the corporation had suffered losses since the certificate was issued, and that the directors had taken steps to reduce the assets, was admissible. *Daley v. People's Building, Loan, & Savings Association*, 533.

See LEASE.

CREDITORS.

See DISCHARGE; FOREIGN CORPORATION, 2, 4, 5; HUSBAND AND WIFE, 2;
INSOLVENT DEBTOR; POOR DEBTOR; TRUSTEE PROCESS.

CRIMINAL LAW.

See BASTARDY; CONSTITUTIONAL LAW, 1; CONTEMPT; CRUELTY TO ANIMALS; EVIDENCE, 6; EXCEPTIONS, 17; FALSE PRETENCES; FORFEITURE; RAPE; RECOGNIZANCE; SENTENCE; SIDEWALK; VARIANCE.

CRUELTY TO ANIMALS.

At the trial of a complaint under Pub. Sts. c. 207, § 53, for cruelty to a horse, the defendant took no exceptions to the instructions to the jury, which were, in substance, that severe pain inflicted upon an animal without justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person occasioning it, is cruel, and the fact that the defendant did not intend to violate the statute is not a defence, if he acted with wanton and reckless disregard of the feelings and sufferings of the horse. The defendant excepted to the refusal to give the following rulings which he requested: "1. The motive of a person who inflicts pain upon an animal, in determining the criminality of the act, may be material. Pain inflicted for a lawful purpose, and with a justifiable intent, though severe, does not come within the statute meaning of 'cruel.' 2. If a defendant, in the proper exercise of his own judgment, honestly thinks he is not being unnecessarily cruel, he must be acquitted. 3. It must appear that the defendant knowingly and willingly was unnecessarily cruel." *Held*, that the first request was rightly refused, the instructions given and not excepted to having dealt properly with the defendant's intention, though not in the terms of the request. *Held, also*, that the other requests were also properly refused, as the defendant's guilt did not depend upon whether he thought he was unnecessarily cruel, but upon whether he was so in fact. *Commonwealth v. Magoon*, 214.

DAM.

See EASEMENT, 4, 5.

DAMAGES.

1. Evidence, in an action for breach of a contract to employ the plaintiff and two other performers for "the week of June 28," that the plaintiff was out of employment for the week, and that he engaged as his own employees persons whose services he was bound to furnish, justifies a finding for more than nominal damages. *Goddard v. Morrissey*, 594.
2. In an action for breach of a contract to build and deliver within a specified time a stated number of bicycles of a certain kind for a price named,

the retail price being fixed by a subsequent agreement between the parties, if the plaintiff was obliged to cancel orders which he had received for machines at that price covering more than the number agreed to be made by the defendant, the measure of damages is the difference between the contract price and the value of the machines if furnished, as evidenced by the orders and the agreement as to the retail price. *Johnston v. Fazon*, 466.

3. If bulbs are sold for the understood purpose of raising lilies for a certain market, the measure of damages for a breach of warranty as to their species is the difference between the value of the crop which the plaintiff raised and a crop of the warranted kind. *Edgar v. Joseph Breck & Sons Corp.* 581.
4. At the trial of an action for false representations in the sale of a bond, the measure of damages is the difference between the actual value of the bond at the time of the purchase and its value if it had been what it was represented to be, secured as represented; and subsequent events may be taken into account in arriving at the value at the time of the purchase, and may show that the market value was illusory. *Whiting v. Price*, 240.

See ASSAULT AND BATTERY; BOND, 2; DOG; EASEMENT, 5; EXCEPTIONS, 22; GRADE CROSSING, 1, 3, 4; HIGHWAY, 1; MECHANIC'S LIEN, 5; PASSENGER, 1, 3; SEWER, 3-5; STREET RAILWAY.

DEATH.

See DEPOSITION; EMPLOYERS' LIABILITY ACT, 7; NEGLIGENCE, 2;
RAILROAD, 2; TOWN.

DECEIT.

If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive. *Weeks v. Currier*, 53.

DECLARATION.

Whatever may be the form of declaration for inducing masters to discharge their servants, by threats, intimidation, or force, when the cause of action is alleged to be that the defendant by false and malicious statements induced a master to discharge his servant, it is essential that the statements made should be substantially set out in the declaration, so that the court may see whether any such effect as is alleged could reasonably be attributed to the statements, and that the defendant may know what he is called upon to meet. It is not necessary that the statements of themselves should be defamatory. *HOLMES, KNOWLTON, & MORTON, JJ.*, dissenting. *May v. Wood*, 11.

See APPEAL, 1; BOND, 4; NEGLIGENCE, 9; SALE, 4.

DECREE.

See APPEAL, 3, 4; EQUITY, 4, 7, 8; TRUST AND TRUSTEE, 8.

DEED.

1. An instruction to the jury, that if the grantor in a deed, "after signing the deed, placed it on the table, or placed it in M.'s hands with the intention that it should become effective and operative, then there was a good delivery of the deed," is erroneous, the evidence tending to show that M. was merely a scrivener before whom the deed was laid upon the table after it was signed, and that he went away and left it there, not representing the grantee in any way. *Meigs v. Dexter*, 217.
2. In this case, which was a petition for the partition of real estate, the court said that it appeared from the two deeds in question that all parties intended that the grantee in each deed should take the legal estate in fee and in trust, and not as feoffee or grantee to uses, and that, when the active duties of the trust ceased with the discharge of a mortgage upon the premises which was referred to in each deed, the statute of uses did not of its own force immediately vest the legal estate in the beneficiary and his heirs. *Dakin v. Savage*, 28.
3. In a case of difficulty depending on nice and not very well defined distinctions, where all the parties legally and equitably interested have acted upon a particular construction of a deed or deeds, it is wise to follow that construction unless it is forbidden by some positive rule of law. *Ibid.*

See ADVERSE POSSESSION; EASEMENT; EQUITY, 2-6; EVIDENCE, 22; TENANTS IN COMMON; TRUST AND TRUSTEE, 2.

DELIVERY.

See DEED, 1; FALSE PRETENCES, 1; TENANTS IN COMMON, 2.

DEMURRER.

See BOND, 4; EQUITY, 9.

DEPOSITION.

It cannot be said, in an action for causing the death of A. while in the defendant's employ, that the exclusion of a portion of an answer in the deposition of the defendant's superintendent, to the effect that he cautioned A. about the dangers of the work, was wrong. *Collins v. Greenfield*, 78.

DESERTION.

See DIVORCE.

DEVISE AND LEGACY.

Where a testator plainly intended by the use of the term "heirs by blood" to indicate those persons whose relationship was by some tie of consanguinity, and to exclude all others, such as husband, wife, or adopted children, an illegitimate son must be regarded within the meaning of the will as the "heir by blood" of his mother. *Hayden v. Barrett*, 472.

See ESTATES OF PERSONS DECEASED; TRUST AND TRUSTEE, 1.

DISCHARGE.

The Pub. Sts. c. 157, § 83, which provide that an insolvent debtor who obtains a discharge in insolvency shall "be forever thereafter discharged and exempt from arrest or imprisonment in any suit, or upon any proceeding for or on account of a debt or demand provable against his estate," include proceedings in which a debt so provable is joined with a separate cause of action accruing after the debtor obtains his discharge. If the creditor desires to arrest the debtor as a means of enforcing satisfaction for the later debt, he must not join it with a debt upon which the debtor is exempted from arrest, or merge it in one judgment with such a debt. *Keough v. Grime*, 519.

See INSOLVENT DEBTOR, 2.

DISSEISIN.

See ADVERSE POSSESSION; TENANTS IN COMMON, 2.

DISTRICT COURT.

See APPEAL, 1.

DIVORCE.

A husband cannot set up the wife's desertion in bar of her libel for his adultery committed before her desertion had continued so long as to give him a right to a divorce. *Walker v. Walker*, 82.

DOG.

1. At the trial of an action for injuries caused by the bite of a dog, the plaintiff requested a ruling that, "upon the undisputed and admitted facts in this case, the only question for the jury to determine is one of damages." The bill of exceptions did not state that it contained all of the evidence material to the issue involved. *Held*, that the question whether the defendant was a keeper of the dog, within the Pub. Sts. c. 102, § 98, was a question of fact for the jury, and that the instruction requested was rightly refused. *Boylan v. Everett*, 453.

2. At the trial of an action, under Pub. Sts. c. 102, § 93, for injuries caused by the bite of a dog, the plaintiff requested a ruling that "where a person allows a dog to be on his premises, occasionally feeding and petting it, sometimes calling it and commanding its obedience, or simply permitting the dog, so to say, to be one of the family, he then is the keeper of the dog, and becomes liable for any damage caused by it." The defendant testified that she "fed and caressed the dog, called it in and sent it out, that it was treated the same as anybody would that had a dog at their home," and that when her nephew was away she took care of it. *Held*, that the judge was not required to rule, as matter of law, that the defendant was the keeper of the dog, irrespective of the fact that the dog belonged to the nephew, who boarded with her. *Boylan v. Everett*, 453.
3. Because it appears that the defendant, in an action under Pub. Sts. c. 102, § 93, for injuries caused by the bite of a dog, exercised some control over and had some custody of the dog, it does not follow that the plaintiff is entitled to a ruling, as matter of law, that the defendant was responsible for the dog as keeper. *Ibid*.
4. At the trial of an action under Pub. Sts. c. 102, § 93, for injuries caused by the bite of a dog, the plaintiff is not entitled, as matter of law, to a ruling that "if the dog belonged to the defendant's nephew and he kept him on the defendant's premises with his consent, and the defendant did anything to maintain or keep him, gave him food or protected him or provided for him in any way, he would be, in the sense of the law, keeper of the dog," if, while the acts recited may be evidence of keepership, more or less significant according to the other facts appearing in the case, it cannot be said that they are conclusive. *Ibid*.

DOMICIL.

See BASTARDY, 2.

DRUNKENNESS.

See EVIDENCE, 19; PASSENGER, 1, 2.

DUE CARE.

See ACTION, 3; EMPLOYERS' LIABILITY ACT, 3, 8, 9; HIGHWAY, 5; MASTER AND SERVANT, 2, 4, 8-10; NEGLIGENCE, 3, 6-8, 13, 14; SEWER, 1-3; TRIAL, 5.

EASEMENT.

1. A deed of land in fee conveyed also "the right to a trench or ditch, and to lay pipes therein" from the granted premises to a certain spring on other land of the grantor, "and the right to take the water of said spring through said trench and pipes on to said granted premises, leaving at all

times a sufficient and convenient watering place of fresh water for cattle and other stock near the head of the spring, . . . meaning hereby to convey all the right which I have to the water at and near the head of said spring, except the aforementioned watering place, which is reserved." *Held*, that the deed created an easement in fee for the benefit of and appurtenant to the land conveyed. *Blood v. Millard*, 65.

2. Upon the subdivision into building lots of land conveyed by a deed which created also an easement in fee for the benefit of and appurtenant to the land, consisting of the right to take the water of a spring, each lot has an interest in the easement, and neither mere non-user nor the use upon the land of water from the city water supply will extinguish the easement. *Ibid.*
3. If a deed of land creates also an easement in fee for the benefit of and appurtenant to the land, consisting of the right to take the water of a spring, a deed, made after the land had been subdivided into building lots by an owner of a part of the land, of the right to take the water of the spring cannot extinguish the easement, nor give to his grantee a right as to an easement in gross; nor can the words "leaving at all times a sufficient and convenient watering place of fresh water for cattle and other stock," in the original deed, whether a reservation for the grantor's life or an exception, avail such grantee, who cannot maintain a bill in equity to restrain a grantee of the land on which the spring is located from interference with the same. *Ibid.*
4. In general, an easement acquired by reservation or grant of a right to raise the water of a stream to a certain height appurtenant to a mill privilege is appurtenant to every part of such privilege. *Forbes v. Commonwealth*, 289.
5. If the right to flow land is created by reservation and by grant to a mill corporation, its successors and assigns forever, with no limitation that the right to raise the water to the height mentioned shall be confined to any particular use of the water, an easement appurtenant to the mill privilege of the corporation is created, and will not be destroyed by taking down the dam and erecting a new one in its place, or by erecting a new dam across the stream above the old dam, on land which was a part of such mill privilege and which is conveyed, with its appurtenances, by the corporation to the Commonwealth, pursuant to St. 1895, c. 488; and if the Commonwealth, under that statute, subsequently takes the servient land in fee, the land is to be treated as subject to the easement in assessing the damages. *Ibid.*

ELECTRICITY.

See EVIDENCE, 18; MASTER AND SERVANT, 4; NEGLIGENCE, 12-14;
STREET RAILWAY.

EMINENT DOMAIN.

See EASEMENT, 5; GRADE CROSSING, 4; HIGHWAY, 1; RAILROAD, 1.

EMPLOYERS' LIABILITY ACT.

1. The risk which a workman assumes by virtue of his contract of employment, under the employers' liability act, St. 1887, c. 270, does not include the risk arising from the negligent act of a superintendent. *Murphy v. City Coal Co.* 324.
2. In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff by being jammed between a car used for transporting coal and an apparatus called a pick-up which propelled the car, there being a possible phase of the case where the risk was not assumed by the plaintiff, the defendant is not entitled to a ruling that, "if the jury find that the plaintiff engaged to run the car in question and undertook that employment, and if the jury find the liability of the pick-up to injure a person in the situation in which the plaintiff was hurt to be proven, then that danger was an obvious risk assumed by the plaintiff for which he cannot recover"; and if it is stated in the bill of exceptions that "full general instructions appropriate to the case were given by the court to the jury, which were not excepted to otherwise than as herein appears," it will be presumed that the jury were rightly instructed upon the subject. *Ibid.*
3. If a workman, without waiting to ascertain why an apparatus used in the business in which he is employed fails to work, of his own motion and without any direct command goes from a place of safety to a position of danger in which he is hurt, he cannot recover for his injury, if he appreciated the danger, or in the exercise of reasonable care ought to have been aware of it. *Ibid.*
4. At the trial of an action for personal injuries under the employers' liability act, St. 1887, c. 270, it appeared that the plaintiff and one P. were engaged in a room about sixty feet long and forty feet wide in the defendant's cotton house in moving cotton out towards the door, P. being on the top of a pile of cotton bales and the plaintiff being on the floor near the bottom of the pile; that the space was about half filled with cotton; that the work was simple, both being familiar with it; and that while the plaintiff was rolling a bale with his back towards P., another bale which was thrown down by P. struck him and broke his leg. The plaintiff sought to hold the defendant, on the ground that its superintendent, who was eating his breakfast not far from the pile when the accident happened, had told P. a short time before to "throw down cotton"; but the plaintiff testified differently in different parts of his testimony as to whether the order to throw down cotton was given when the superintendent first ordered them to do this work, or later just before the bale came down. *Held*, that there was no evidence of any order of the superintendent that was more than a command or request to hurry on the work in a proper way, or which made the superintendent or his employer responsible for P.'s negligence in throwing down the bale upon the plaintiff. *Gouin v. Wampanoag Mills*, 222.
5. An action for personal injuries sustained by the plaintiff, while helping to load a machine upon a car, by falling through the side doorway of the

car, cannot be maintained on the ground that there was no gang-plank at that door, if, assuming that a gang-plank is a part of the "ways, works, or machinery" of the employer, within St. 1887, c. 270, there is nothing to show that he had not furnished a suitable gang-plank, and if, it being the duty either of the plaintiff and his fellow workmen to put the gang-plank in place, or of the defendant's foreman to see to it, there is nothing to show whether the sole or principal duty of the latter was that of superintendence, or whether it was a part of his duty to see that the gang-plank was in place while the men were loading the machine. *Trimble v. Whitin Machine Works*, 150.

6. A person was employed by a street railway corporation as a car shifter, whose duty it was to get cars ready for the conductors and motormen. Upon an occasion when a conductor went into the car-house for a car, which had to be moved to the main track by means of a transfer table moved by electric power operated by the car shifter, the latter ran the car on to the table, handed the trolley rope, which had to be shifted to the other end of the car to the conductor, saying, "Here is the rope," and, when the conductor had walked with the rope half way round to the middle of the car, started the table. The conductor called out to him to wait, as a spring attached to the roof of the car was caught, and the conductor, while trying to free the spring, was injured by the moving of the table. There was a foreman who had charge of the car-house, but he was not present at the time of the accident. *Held*, in an action for the injury, that the acts of the car shifter were not acts of superintendence, under the employers' liability act, St. 1887, c. 270. *Whelton v. West End Street Railway*, 555.
7. In an action under the employers' liability act, St. 1887, c. 270, against a town for causing the death of A. while employed in raking stones down a hillside upon land belonging to the town that they might be gathered and broken up in a stone crusher for use in macadamizing its streets, it appeared that above A. was a large overhanging rock which looked safe from where he was at work, but which had a large crack behind it caused by blasting done two days before; and that this rock fell a few minutes after A. went to work and crushed him. There was evidence that the defendant's superintendent put A. to work where he was hurt; that the former had been told that the rock which fell upon A. could and ought to be barred down without further blasting; and that he had said that he would see to it. *Held*, that the jury might have found that there was a concealed danger of which the defendant had notice, but which A. did not know and had no chance to find out, and of which he did not take the risk. *Collins v. Greenfield*, 78.
8. In an action against a town under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while engaged in digging a sewer trench, by reason of the bank, upon which the defendant's superintendent was standing at a place where there was a crack in the earth, falling upon him, it is competent for the jury to find that the superintendent, who had general control of the whole work of digging the trench, in walking along the bank and in stopping to look down at

the workmen, was engaged in an act of superintendence ; and it is for the jury to say whether, in view of the crack in the earth, it was negligent for him to stand where he did without giving any warning. *McCoy v. Westborough*, 504.

9. If the bank of a sewer trench has been cracked by the blasting of rock in the line of the sewer, and a person employed in digging the trench is injured by the falling of the bank upon him, in the absence of anything to show whether such cracks are liable to occur in digging and blasting out trenches for sewers, and if so, how frequently, and whether he should have anticipated it, it cannot be ruled, as matter of law, in an action for the injury, that the risk was one which the plaintiff assumed ; and although he was not set to work in the particular place where he was injured, and was an experienced workman, he had a right to rely somewhat upon the defendant's superintendent as to the safety of the place where he was working, and it is for the jury to say whether he was in the exercise of due care. *Ibid*.

See EVIDENCE, 12 ; MASTER AND SERVANT, 6-8 ; NOTICE ; RAILROAD, 2.

ENCUMBRANCE.

See FALSE PRETENCES, 1, 3, 4, 7, 8 ; SPECIFIC PERFORMANCE.

EQUITY.

I. Jurisdiction and General Principles.

1. If a contract for the sale of land, containing a warranty of the number of square feet of the land, is based upon an honest mistake on the seller's part as to the number of feet, which mistake is induced by the false, although not fraudulent, representation of a broker, who was either the buyer's agent in the transaction, or a person who had entered into a contract with the seller and then had assigned his rights thereunder to the buyer, a court of equity has the power to permit the seller to rescind the contract on the ground of mistake, if the other party will not accept performance of the contract, omitting the particular stipulation inserted through the mistake. *Keene v. Demelman*, 17.
2. A. executed a deed of his land, without inserting the name of the grantee in the blank spaces left for it and delivered it to B., who was the agent of C., and B. afterwards filled the blanks with the name of C., caused D. to write his name as a witness upon the deed, although D. did not see A. or his wife sign it, and then had it recorded in the county in another State, in which the land was situated. A. was induced to sign and deliver the deed by representations of B. that a house and lot in this Commonwealth owned by C., which were in the hands of B. for sale and which were conveyed to A. in exchange for the property described in the deed from A., had recently been sold for thirty-two hundred dollars, were rented for fourteen dollars per month, and had only certain named encumbrances upon them, all of which representations were false, were made

by B. as matters within his personal knowledge, and were relied upon by A. as inducements to make the contract. A. offered to reconvey the property conveyed to him by C., and demanded a conveyance to himself of the property described in the deed delivered to B. *Held*, that relief might be granted to A. in equity to compel a reconveyance, and that the fact that B., to whom C. had conveyed the property fraudulently obtained, had expended some money upon it, did not relieve him from the obligation to return it. *Weeks v. Currier*, 53.

3. Since the enactment of St. 1877, c. 178, (Pub. Sta. c. 151, § 1,) relief may be had in equity to set aside a deed of real estate procured by fraud, and to obtain a reconveyance. The remedy at law by a writ of entry is concurrent. *Ibid*.
4. Fraudulent representations and oral misstatements made with intent to deceive are not so merged in a written instrument procured by means of them that they may not be made the basis of a decree to set it aside. *Ibid*.
5. In a suit in equity to compel the reconveyance of property obtained by false and fraudulent representations, a defendant is affected by those representations made by another while acting as his agent, within the scope of his authority, as if he had made them himself. *Ibid*.
6. Where, within a year after the proving of a will which gives the widow the "use, income, and improvement of all" the real property "with the right to sell any or all of the same during her natural life," and at her decease gives the same to certain devisees, a sale and conveyance of all the realty are made by her in good faith and for a valuable consideration, and by the terms of the deed the grantee claims thereunder subject to the rights of the executor as such, a bill in equity brought by the executor and devisees, the former contending that the sale is a cloud upon his title as executor, since he needs to make a sale of the land for the payment of debts and charges of administration, and the latter that it constitutes a fraud upon their rights, must be dismissed. *Hardy v. Sanborn*, 405.
7. At the trial of a bill in equity under St. 1888, c. 390, § 70, to redeem real estate from a tax sale, it appeared that the plaintiff was the owner of a remainder in fee after the life estate of the defendant B., whose duty it was to pay the tax, that B. and H., who purchased the tax title a week after the sale, kept the sale secret from the plaintiff in order to cause him to lose the right of redemption, thus wrongfully conspiring to defraud him, that B. and H., more than two years and less than five years from the tax sale, joined in a deed to the defendant R. which gave him the fee, if the tax title could not be redeemed, and he gave back to H. a mortgage still outstanding. It was not alleged that R. took with notice of the right to redeem, nor that he was a party to or chargeable with knowledge of the fraud or conspiracy of B. and H., and his answer did not allege that he was a purchaser without notice and in good faith. The defendant W., who was the original purchaser at the tax sale, sold out his title immediately after the sale, and by his answer said that he had no interest in the estate. A decree was entered that the plaintiff pay to the defendant R. the original sum paid by him, with all intervening sums paid as taxes,

with interest to the date of the decree, and costs, and that R. give to the plaintiff a deed of release, and that he pay to the plaintiff the costs of suit. *Held*, that the decree was to be affirmed with costs, but with leave to the plaintiff to apply to a single justice for a modification as against B. and H., and requiring H. to release the remainder from the operation of the mortgage, and that the bill was to be dismissed as against W., but without costs. *Widorsum v. Bender*, 436.

See CITY, 6; EASEMENT, 3; SPECIFIC PERFORMANCE; TRUST
AND TRUSTEE.

II. *Pleading and Practice.*

8. When the evidence is not before the court, and it does not appear as matter of law from the facts set forth in the decree that more relief ought to have been granted, this court cannot revise the finding of the single judge. *King v. Daly*, 492.
9. A bill in equity, by a minority stockholder against a corporation and a majority stockholder, to compel the latter to restore to the corporation money appropriated by him, alleged that the defendant's salary was fixed at fifty dollars a week when the corporation was organized; that there were three directors, the plaintiff, the defendant, and one B.; that the defendant from June, 1891, to May, 1896, appropriated to himself under the pretence of salary one hundred dollars per week, without the knowledge of the other directors; that when he found it out the plaintiff protested; that the defendant then called a directors' meeting in May, 1896, and procured the majority of the directors to pass a vote making his salary one hundred dollars a week from June, 1891, and approving the payments already made; that the plaintiff protested in writing, and demanded of the defendant that he pay back to the corporation the amount he received in excess of fifty dollars, which he refused to do; and by an amendment to the bill, that the defendant had appropriated a large amount of funds of the corporation to his own use, the details of which the plaintiff was unable to give, because the defendant concealed the financial affairs and books of the corporation. *Held*, on demurrer, that enough was alleged in the bill, as amended, to require the defendants to answer the bill as to the salary of one hundred dollars per week received by the defendant stockholder from June, 1891, to May, 1896. *Blair v. Telegram Newspaper Co.* 201.

See APPEAL, 3, 4; GRADE CROSSING, 2; INJUNCTION; PARTIES, 2;
SUPREME JUDICIAL COURT.

ESTATES OF PERSONS DECEASED.

1. A testator gave by will the residue of his estate "unto my two nieces now living, G. and F., . . . to be equally divided between them, share and share alike." The legacy to G. was void under Pub. Sts. c. 127, § 8. *Held*, that that legacy must be administered as intestate property. *Powers v. Codwise*, 425.

2. A testator gave by will two hundred dollars each to his sons H. and W., and to his wife all the remainder of his personal estate, with the real estate occupied as a homestead. He then gave her a life estate in the remainder of his real estate, providing as follows: "Furthermore, at the decease of my said wife I hereby give . . . to my son W. the sum of five thousand dollars to be paid to him at the decease of my said wife." He then provided that, after the decease of his wife and the payment of the five thousand dollars to W. "out of my estate, in the which the life estate is given to my said wife, I hereby give . . . the use . . . of what shall then remain thereof in equal shares" to H. and W. during life and at the decease of H. one half in fee to his heirs and after the decease of W. "the other undivided half part to his heirs." The wife and two sons survived the testator, and W. died before the wife. *Held*, on the death of the wife, that the legacy of five thousand dollars vested on the death of the testator, and that the administrator with the will annexed was to sell so much of the real estate as might be necessary to produce this sum, with interest from the decease of the widow, and pay the same to the administrator of the estate of W. *Cook v. Hayward*, 195.

See DEVISE AND LEGACY; EQUITY, 6; EXECUTOR; FOREIGN CORPORATION, 4, 6; SPECIFIC PERFORMANCE, 2.

ESTOPPEL.

1. The fact that a vendor took the note of a certain person when he supposed that he was dealing with him alone is not a bar to an action against a third person for the price of the merchandise, the note having been offered back. *Boston v. Amadon*, 84.
2. In an action on a policy of life insurance the contention of the administrator of the insured that, relying upon the statement of an agent of the company that the claim had been paid, he was induced to postpone his action until after the expiration of the period during which only the contract provided that action could be brought, and that therefore the company was estopped from setting up this defence, cannot avail, if it does not appear that the agent was authorized by the company to make such statement, that the company ever ratified it or even knew that it had been made, and if it was not made within the scope of his authority real or apparent. *Carlson v. Metropolitan Life Ins. Co.* 142.

See AMENDMENT; INSURANCE, 5; PRINCIPAL AND AGENT, 4;
RAILROAD; TENANTS IN COMMON, 1.

EVICTIION.

At the trial of an action by the assignee of a lease for an eviction from the leased premises, consisting of a store and the cellar under it, it appeared that the store was closed by somebody for several days after the assignment of the lease, to which the defendant had assented; and that the door to the cellar from the bulkhead on the outside of the premises was fastened

at or about the same time by a bar on the inside, and remained fastened for a longer period of time. There was no evidence that the defendant closed the store as distinguished from the cellar; but the evidence was that he refused to open the cellar door at the foot of the bulkhead, and said that he would not open it until he got a sum named. A witness testified that, when the assignor was moving out, the defendant told the former that the cellar door was open if the assignor wanted to use it; and also testified that the bulkhead was open, but the door at the foot of the stairs was closed and fastened. The assignor testified that he never received any key to this door from the defendant, or anybody representing him, "and it was always open before the date they say it was closed." Neither the assignor nor the plaintiff saw the defendant close the door or fasten it, and did not know who did fasten it. *Held*, that it did not appear that the direction of a verdict for the defendant was wrong. *Riley v. Lally*, 244.

See USE AND OCCUPATION.

EVIDENCE.

1. Judicial notice cannot be taken of the ordinances of a city, unless they are put in evidence. *Attorney General v. McCabe*, 417.
2. In an action against the administrator of a guardian for the breach of his bond the defendant cannot put in evidence in his own favor the declarations of his intestate. *Forbes v. Ware*, 306.
3. Even if it is assumed, in an action for the breach of a guardian's bond, that evidence offered by the defendant should have been admitted, yet its exclusion does him no harm, if it falls far short of establishing his contention of a certain payment as a right to a set-off. *Ibid*.
4. In an action of replevin, if the defendant relies upon a mortgage which has been assigned to him, and which was drafted by the use of a printed form containing blanks, and the plaintiff contends that there has been a material alteration of the mortgage since he signed it, by writing the names of several articles in the blank to be filled with the description of the property, evidence of the plaintiff's expectation as to how the blanks were to be filled by the mortgagee, to whom the mortgage after being signed was intrusted for that purpose, may be competent. *Smith v. Jagoe*, 538.
5. As in an action on a life insurance policy the defences which might be made if the application were part of the contract were in fact on trial by the jury, the evidence as to applications by the insured to other insurers was relevant and competent upon the issue whether his alleged misrepresentations to the defendant company were made with actual intent to deceive. *Brown v. Greenfield Life Association*, 498.
6. At the trial of an indictment for obtaining money from A. by false pretences, evidence of A. that the alleged representations satisfied him and induced him to give the defendant the money, and that he would not have parted with the money but for them, is admissible. *Commonwealth v. O'Brien*, 248.

7. In an action for the breach of an alleged oral contract to employ the plaintiff to erect a building, it appeared that the defendant advertised for bids, stipulating that all labor should be done by union men; that the plaintiff made the lowest bid; and that the parties met on a certain day, when, according to the plaintiff's testimony, the contract was awarded to him; but the defendant testified that he went no further than to say that if the plaintiff could produce to the defendant's satisfaction evidence or a certificate from the labor unions that the plaintiff was acceptable to them, he should have the contract. After this meeting of the parties, a building laborers' union voted that "we refuse to work for any contractor that gets this job that has not had all union men for the last two years." There was evidence that the plaintiff had employed some non-union men within two years; and at another meeting between the parties and some representatives of labor unions, the plaintiff offered to give a bond to employ only union men upon the job. On the next day, at a special meeting of the building laborers' union, it was voted that "we sustain our former action." *Held*, that the two votes were admissible in evidence. *Morrissey v. Geisel*, 95.
8. At the trial of an action upon a policy of insurance against loss by fire, in which a vote of a local board of underwriters, of which the defendant's agent was a member, is relied upon as giving a permit for non-occupancy of the insured premises, evidence of the existence, organization, and action of the board and its relations to the defendant is competent, as is also a lease of the property from the plaintiff to a third person, who was named in the vote. *Quinsigamond Lake Steamboat Co. v. Phenix Ins. Co.* 367.
9. In an action upon a bond conditioned to indemnify the plaintiff for all loss sustained by reason of his becoming bail for A., who had been arrested upon a criminal charge, B., an attorney who had procured the plaintiff to bail A. and the bond in suit to be made, testified, on cross-examination, that he was retained by A. as his attorney. The plaintiff then asked how much his retainer was. The question was excluded, and the plaintiff then stated that he proposed to show that B. received a large sum of money from A. to indemnify the sureties, but the question was again excluded. The plaintiff then asked B. how much money he received from A. The judge excluded this question, but offered to allow the plaintiff to ask B. how much, if anything, he received to indemnify the plaintiff or the sureties on the bond. B. denied that he received any money from A. to indemnify the sureties. The plaintiff then asked B. if A. did not let him have a certain sum, stating that he desired to show that B. received a large sum of money from A., and to submit to the jury the question whether it was not received for some purpose other than that of services as counsel; but the judge excluded the evidence. *Held*, that these questions were properly excluded, in the discretion of the judge. *Tuson v. Crosby*, 478.
10. The affidavit of the defendant in an action by an assignee in insolvency to recover the value of goods alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, and that of his attorney, filed in an action in another State brought by the present defendant against the insolvent, in which affidavit the defendant states that he

was present at an interview referred to in his attorney's affidavit, that he knew the contents of that affidavit, and that the statements therein were true, are rightly admitted in evidence; and the affidavit of the defendant's agent, filed in the same case in the other State, which tends to contradict some parts of his testimony in the present case which are unfavorable to the plaintiff, who called him as a witness, is also competent. *Knight v. Rothschild*, 546.

11. In an action by an assignee in insolvency to recover the value of a quantity of garments alleged to have been conveyed by the insolvent to the defendant in fraud of the insolvency laws, a person who had been employed in the insolvent's store for six years and knew the cost and selling price of all garments that came into the store during that period and also the fair value of such goods, and a part of whose business it was to sell them to customers, and who saw all the garments taken away by the defendant, is rightly allowed to testify to the value of such garments. *Ibid.*
12. At the trial of an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff, who was employed in a quarry, by the giving way of the guys of a derrick near which he was working, it appeared that the defendant's superintendent directed a chain to be placed around a large stone and fastened by a slip link at the back of the top edge of the stone in order to turn it, the end of the chain being attached to the boom of the derrick; and that, when the derrick was started, the stone moved and canted on its edge and then lurched over, bringing a strain on the derrick, and the guys then gave way. Several experts were called by the plaintiff and asked, against the defendant's objection, a hypothetical question as to the usual method of turning such a stone, describing its size and situation as shown by the evidence, by such a derrick, describing it. The witnesses described a different method from that used, and testified in effect that the method pursued caused the result; and these were contradicted by experts for the defendant. *Held*, that the evidence objected to was competent; and that there was evidence of negligence in handling the stone which caused the guy to give way. *Leslie v. Granite Railroad*, 468.
13. In an action for personal injuries occasioned to the plaintiff, while employed in a quarry, by the giving way of a guy of a derrick, the end of which was fastened to the derrick after passing through a ring by a patent clip made of cast iron, a witness, who was an expert in iron and steel, testified that there was a difference in the strength of cast iron and wrought iron. He was then asked, against the defendant's objection, which was the stronger of the two, and answered, "wrought iron." At this time there was no evidence in regard to these clips except that they were used to fasten the guys; but subsequently the defendant put in evidence that this clip was the best kind obtainable. *Held*, that the evidence objected to was competent at the time it was introduced. *Ibid.*
14. The proper way of turning a large stone in a quarry so as not to bring an undue strain upon the derrick used in the work may not be matter of common knowledge, but a subject for expert testimony. *Ibid.*

15. An expert witness called by the plaintiff in an action for personal injuries alleged to have been caused by the negligent manner of moving a stone in a quarry, who has testified, on cross-examination, without objection by the defendant, that the method adopted would be improper, may be allowed, on re-direct examination, to state the reason of his opinion. *Leslie v. Granite Railroad*, 468.
16. In an action for personal injuries caused by being caught by a set screw fastening a collar near the end of a revolving shaft, the question "whether or not it is customary in factories to have a collar with a projecting set screw placed near a pulley, where it is necessary for a person to go frequently to do something with reference to putting on a belt," is properly excluded. *Ford v. Mount Tom Sulphite Pulp Co.* 544.
17. In an action against a street railway corporation for injuries sustained by a conductor, while shifting the trolley rope on a car which had been run on to the transfer table in a car-house, by having his foot caught in a space of about an inch and a half between the bottom of a track rail projecting from the table and the house floor, evidence that after the accident the floor of the car-house was raised so that the projecting rail lay flush with the floor, filling the space in which the plaintiff's foot was caught, and that after the change the table worked perfectly, is rightly excluded. *Whelton v. West End Street Railway*, 555.
18. In an action against an electric lighting corporation for personal injuries occasioned to the plaintiff, while in its employ as a lineman, by the breaking and falling of a pole on which its wires were suspended, the words, "It is not the lineman's business to do it," are rightly stricken from the answer to the question, "That is so simple a man can do it [inspect a pole] who is about to climb a pole as well as anybody?" and the questions, whether it is a "part of the work of a lineman to make that inspection," and whether linemen "customarily perform that work of inspection," are also rightly excluded. *McIsaac v. Northampton Electric Lighting Co.* 89.
19. At the trial of an action for personal injuries alleged to have been received from a defect in a highway, testimony relating to the plaintiff's habits as to temperance and to his reputation for sobriety, offered by him as bearing upon the probability of his intoxication, is rightly excluded; and testimony of witnesses as to whether the plaintiff was intoxicated is rightly admitted. *Edwards v. Worcester*, 104.
20. At the trial of an action for personal injuries alleged to have been received from a defect in a highway, the testimony of an alleged expert, offered to show whether the road was safe and convenient for travel, relates to a matter on which the common experience and observation of the jury qualifies them to pass, when the actual condition of the way has been described to them, and on which they need no assistance from an expert, and it is properly excluded. *Ibid.*
21. At the trial of an action for the conversion of certain bottles, a witness testified to the market value thereof at the time of a conditional sale in question in H. He had been in the bottling business over thirty years, and in H. eleven years, and he testified that he knew the market value of bottlers' supplies in H. at the time. He bought these very bottles with

his own name blown in them, and previously had often bought bottles with other men's names blown in them. *Held*, that it could not be said that the experience of the witness showed that the judge exercised his discretion wrongly in admitting the evidence. *Vandercook v. O'Connor*, 301.

22. If the petitioner for partition of land has introduced evidence tending to show that her relations and those of her son with the husband of the grantor in a deed under which the respondent claimed title to the land had always been friendly, the respondent may put in evidence an expression of the grantor's husband in his last sickness in regard to the petitioner's son manifesting ill feeling towards him. *Meigs v. Dexter*, 217.

See ACTION, 1; ADMISSIONS; ANSWER; APPEAL, 3, 4; BASTARDY, 3, 4; COVENANT; DAMAGES, 4; DEED, 1; DEPOSITION; EXCEPTIONS, 5, 6, 8-15, 17, 20, 22, 23; EXPERT; FALSE PRETENCES, 4, 5; FORCIBLE ENTRY AND DETAINER; FRAUDS, STATUTE OF, 1; GUARDIAN AND WARD, 2-4; HUSBAND AND WIFE; INSURANCE, 3; MASTER AND SERVANT, 4, 5; MECHANIC'S LIEN, 1, 2; NEGLIGENCE, 1, 2, 9, 10, 11, 13, 14; NOTICE; PHOTOGRAPH; PRINCIPAL AND AGENT, 1-3, 5; RAPE; SPECIFIC PERFORMANCE, 2; TOWN, 1; TRIAL, 1, 2, 4, 5; TRUST AND TRUSTEE, 2; VARIANCE; WAIVER, 2; WITNESS.

EXCEPTION.

See EASEMENT, 3.

EXCEPTIONS.

1. *It seems* that exceptions will not lie in a hearing upon a petition for the writ of habeas corpus. *Bishop, petitioner*, 35.
2. No exception lies to the refusal to give an instruction in the language requested, if it is given in substance. *Dorey v. Metropolitan Life Ins. Co.* 234; *Frost v. Courtis*, 401; *Boylan v. Everett*, 453.
3. Where an exception taken to the charge to the jury is only so far as it is inconsistent with requests for rulings which were rightly refused, the exception must be overruled. *Boylan v. Everett*, 453.
4. No exception lies to the refusal to give a ruling which involves a question of law immaterial in view of the facts as determined by the justice, sitting without a jury. *Morse, Williams, & Co. v. Ellis*, 378.
5. If a bill of exceptions contains certain rulings and findings of the judge, sitting without a jury, followed by a statement that he also ruled that, as matter of law, upon the whole evidence, the plaintiff could not recover, such statement will be taken to mean that he ruled upon the evidence and the specific findings previously set forth. *Johnson v. Kimball*, 398.
6. The point, that there was a variance between the proof of the defence and the allegations of the answer in an action, if not raised at the trial, is not open on a bill of exceptions. *Tuson v. Cronby*, 478.
7. It is incumbent upon the excepting party to show by his bill of excep-

- tions that the rulings excepted to were wrong, and, further, that he was harmed by the error. *Smith v. Jagoe*, 538.
8. The contention that questions admitted under objection were leading in form is not open on a bill of exceptions which does not show that the questions were objected to for form. *Ibid.*
9. In an action against the members of a partnership for an alleged breach of a contract to employ the plaintiff, no exception lies to the admission in evidence of a conversation between the plaintiff's wife and one of the defendants as to the terms or details of the contract, either just before the latter became a partner and when he was in the employ of the firm, or just after he became a partner, it not appearing that the judge refused to limit the effect of the evidence, if the jury should find that the statement was made before the defendant became a partner. *Nickerson v. Russell*, 584.
10. Where an exception to a refusal to direct a verdict for the defendants is put on the ground, which appears to be an afterthought, that the evidence that they were partners was insufficient, slight evidence to that effect uncontroverted will be deemed sufficient. *Vandercook v. O'Connor*, 301.
11. It is a sufficient answer to an exception to the exclusion of evidence that the date of a mortgage of personal property had been changed after recording so as to show, contrary to the fact, that it was recorded in time and was valid, that there was no evidence that the mortgage covered the merchandise in question, and that there was express evidence that it did not cover it. *Ibid.*
12. If evidence, the admission of which is excepted to, seems to have been competent upon the issues raised by one of two counts, and when those issues disappeared the excepting party did not ask that the evidence should be withdrawn from the consideration of the jury, who returned a verdict on the other count, the exception will not be sustained. *Brady v. Norcross*, 331.
13. In an action on a life insurance policy there is no ground of exception to the exclusion of questions put to the beneficiary, who had assigned the policy to another as security for money due, as to when that indebtedness was paid, and whether it was paid before the death of the insured, as it is immaterial whether the indebtedness was paid before the death of the insured. *Brown v. Greenfield Life Association*, 498.
14. At the trial of an action for breach of an alleged warranty in the sale of lily bulbs known as longiflorum, those of an inferior variety having been delivered, no exception lies to the exclusion of evidence of a purchase of fifty of the inferior lilies at a retail store, the witness having been allowed to state the market value of these lilies. *Edgar v. Joseph Breck & Sons Corp.* 581.
15. It is not a ground of exception that testimony relating to an immaterial matter is admitted to contradict the excepting party's evidence on the same point. *Meigs v. Dexter*, 217.
16. At the trial of a petition for partition of land, the judge instructed the jury as follows: "I am requested to give you this instruction, which not without some modification can I do: 'It is not necessary that a person

should be insane upon all subjects. It is sufficient to avoid her deed if it appears that she had an insane delusion upon one subject, and acting under the influence of that one delusion made the deed.' I do not think that goes quite far enough. A person may have an insane delusion, I think, on one subject, . . . and yet not be insane on other subjects, and have good mental capacity to do business. The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion, and which renders a person of unsound mind in respect to that thing. . . . If the act is not inspired, moved by that particular delusion, it does not affect their transactions, nor would it affect a deed." *Held*, that the petitioner had no ground of exception. *Meigs v. Dexter*, 217.

17. At the trial of an indictment for obtaining money by false pretences that certain property was owned by the defendant solely, and that he intended to organize a corporation and become a large owner of stock in it by turning over the property to the proposed corporation in exchange for stock, no exception lies to the refusal to rule that there was no evidence that the defendant did falsely pretend that he proposed and intended to become a large owner of stock in the corporation by turning over the property in exchange for it; the statements testified to being that the defendant stated that he intended to form a corporation and would deliver stock to the witness, who was the defrauded person. *Commonwealth v. O'Brien*, 248.
18. In an action for false representations, by which the plaintiff was induced to buy stock of a corporation, to the effect that a certain amount of the capital had been paid in, the plaintiff testified to the representations, and also put in a letter of the defendant written to a third person soon after the conversation, stating that the corporation had no stockholders. The defendant was then asked by his counsel to explain what he meant by the expression; but any explanation was excluded. *Held*, that the rule requiring the excepting party to show what the testimony was expected to be must be applied. *Honsucle v. Ruffin*, 420.
19. Where, in an action of tort for the conversion of certain personal property, it is necessary to submit the question at issue to the jury, there being evidence to support the contention of each party, and it is done in a form not objected to and the only exception taken was to certain portions of the charge, which are set forth in the bill of exceptions, and the whole charge is not reported, but it appears that other instructions not excepted to were given, it must be assumed that appropriate instructions were given if the jury should find that the defendant was acting merely as the agent of the plaintiff. *Whitney Electrical Instrument Co. v. Anderson*, 1.
20. The weight of the evidence is not for this court to determine, nor is the question before it whether there is any evidence for the jury, if this is conceded. *Ibid*.
21. Where a party to an action contends that on the evidence reported certain principles of law are involved, upon which the jury should have been instructed, and these do not appear in the instructions given, but it appears that the party has picked out a single paragraph of the charge to insert in

the bill of exceptions, and it does not appear that he asked for any instructions, or, if he did ask for them, that they were not given, he shows no ground of exception, as instructions should have been requested. *Whitney Electrical Instrument Co. v. Anderson*, 1.

22. At the trial of an action for alleged slander in accusing the plaintiff, a physician, of ravishing the defendant's wife, the finding of the jury that the defendant's justification is established makes it unnecessary for them to consider the subject of damages, and hence renders immaterial exceptions to the exclusion of evidence offered by the plaintiff to show his general reputation as a man of skill in his profession, to prove that his practice as a physician was profitable, to prove specific acts and operations performed by him tending to show his professional ability, and to show by his own testimony the diminution of his business since the utterance of the alleged slander by the defendant. *Parker v. Griffith*, 87.
23. Where upon a motion for a new trial the plaintiff asks the judge to rule that there was error in the instructions which permitted the jury to find for the defendant upon insufficient evidence, and excepts to his refusal so to rule, no exception having been taken to the instructions and the question not having been previously raised, the motion is addressed to the discretion of the court, and a refusal of the judge to grant such request on the hearing of the motion is not a matter of exception; the court adding that, whatever might be thought of the credibility of the principal witness for the defendant, there was enough in her testimony to warrant the judge in submitting to the jury the question decided by their verdict. *Ibid*.
- See DOG, 1; EMPLOYERS' LIABILITY ACT, 2; FALSE PRETENCES, 4; FALSE REPRESENTATIONS, 5; NEGLIGENCE, 4, 7; NEW TRIAL; PRINCIPAL AND AGENT, 2; REPORT; TRIAL, 5; USE AND OCCUPATION.

EXECUTION.

See CONTEMPT, 4; SIDEWALK.

EXECUTOR.

J., one of two executors named in the will of T., declined appointment in January. In February, T., the other executor, filed a petition for the probate of the will and for letters testamentary. On March 8 the will was proved, and letters were granted to T. An appeal was taken, and on June 11 the decree of the Probate Court was affirmed. On July 1, J. filed a petition for leave to withdraw his renunciation and to be appointed executor jointly with T. On July 2, T. filed his bond and took out letters. On July 29 the Probate Court made a decree that letters testamentary should issue to J. as co-executor with T. Held, that after June 11 it was too late for J.'s petition to be entertained, supposing that further proceeding upon it would not have been cut off on July 2 by T.'s receipt of his letters after giving bond. *Jewett v. Turner*, 496.

See EQUITY, 6; FOREIGN CORPORATION, 4; INSURANCE, 2; PROMISSORY NOTE; TRUST AND TRUSTEE, 3.

EXPERT.

Whether a person should be admitted as an expert as to the value of land is largely in the discretion of the justice presiding at the trial. *Howland v. Westport*, 373.

See EVIDENCE, 11, 12, 14, 15, 20, 21; MASTER AND SERVANT, 5;
PRINCIPAL AND AGENT, 3.

EXTINGUISHMENT.

See EASEMENT, 2, 3.

FALSE PRETENCES.

1. An indictment, under Pub. Sts. c. 203, § 59, alleged that the defendant, at a time and place in this Commonwealth named, with intent to cheat and defraud A., falsely pretended that certain property situated at N. in another State was "then and there" solely owned by the defendant, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to organize a corporation and become an owner of stock in it by turning over the property to the proposed corporation in exchange for stock; that the defendant "then and there" executed and delivered to A. an instrument, which was set out, and which promised to convey twenty shares of the corporation to A. in consideration of \$2,000; and that A. "then and there," believing the representations, was induced thereby to deliver and did deliver a check for \$2,000 to the defendant upon the execution and delivery of such instrument; and negatived most, but not all, of the alleged pretences. *Held*, that it was sufficiently alleged that the delivery of the instrument was made the condition of the payment, and that the condition was performed and accepted as performed by A.; that the words "then and there" in each instance referred to the time and place of the representations, and not to N.; and that it was not necessary to allege that the instrument was falsely made, and enough of the alleged pretences were negatived to show that the scheme was fraudulent. *Commonwealth v. O'Brien*, 248.
2. It is no defence to an indictment for obtaining money by false pretences, that an agreement, upon the execution and delivery of which by the defendant the money was paid, was illegal. *Ibid*.
3. If representations of the defendant, in an indictment for obtaining money by false pretences, that he owned certain property solely, that there was no encumbrance upon it, and that he did not owe a dollar to any one, were false, he is not entitled to a ruling that the jury should acquit him, unless they should find the further representations that he intended to form a corporation and exchange the property for stock to have been false, as charged; and, if the evidence shows that A.'s money was obtained by a fraudulent scheme, the jury are warranted in finding that the pretences were false throughout. *Ibid*.

4. At the trial of an indictment for obtaining money by false pretences that certain looms and machinery were owned by the defendant solely, and that "upon said looms and machinery there was no encumbrance," the defendant requested the ruling that there was no evidence that the property was encumbered on the date when the representations were made. The judge instructed the jury that there was no such evidence, and that the government's position was not that the defendant owned the property and that it was encumbered, but that he did not own it at all and never had owned it. *Held*, that the defendant had no ground of exception. *Commonwealth v. O'Brien*, 248.
5. If a person is indicted, under Pub. Sts. c. 203, § 59, for obtaining money by false pretences, it is immaterial that by the common law of this Commonwealth the offence charged is not a crime, or what the common law of another State is, where the first conversation between the parties took place. *Ibid*.
6. It is immaterial whether the intent of a person charged with obtaining money by false pretences was consciously directed to law breaking. *Ibid*.
7. If it is proved that the defendant in an indictment for obtaining money by false pretences that certain property was owned by him solely, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to form a corporation and exchange the property for stock, pretended to own the property and did not, he is not entitled to ask that a verdict be directed for him. *Ibid*.
8. At the trial of an indictment for obtaining money from A. by false pretences that certain property was owned by the defendant solely, that there was no encumbrance upon it, that he did not owe a dollar to any one, and that he intended to form a corporation and exchange the property for stock, the defendant asked a ruling that the jury might find the false pretences as to the defendant's ownership and freedom from debt immaterial. The judge instructed the jury that these were the representations upon which the government relied; and that, if the inducement to A. was complete in another State, where the first conversation took place, and the representations made here were not the inducement and operative cause to A. to part with his money, then the defendant should be acquitted, although he repeated the false representations to A. here before the money was delivered. *Held*, that this was sufficiently favorable to the defendant. *Ibid*.

See EVIDENCE, 6; EXCEPTIONS, 17.

FALSE REPRESENTATIONS.

1. A false representation that a bond of a corporation is secured by a mortgage of real estate of the value of half a million dollars may be recovered for, although the bond itself states that it is "secured by a first mortgage on all the property, rights, and franchises of said company (present and future acquired)." *Whiting v. Price*, 240.
2. In an action for false representations in the sale of a bond, whether the plaintiff was warranted in relying on the representations may be a ques-

tion for the jury, notwithstanding the fact that the defendant referred to the sources of his information and advised the plaintiff to consult them. *Whiting v. Price*, 240.

3. The plaintiff, in an action for false representations in the sale of a bond, need not offer to return the bond to the defendant. *Ibid.*
4. An instruction to the jury, in an action for false representations in the sale of stock, that if the plaintiff ought to have discovered the truth before he put in the money, they should find for the defendant, is sufficiently favorable to the latter. *Honsucle v. Ruffin*, 420.
5. In an action for false representations, by which the plaintiff was induced to buy stock of a corporation, to the effect that a certain amount of the capital had been paid in, the defendants testified that they had put in the safe connected with the corporation's office several hundred dollars of their own money which had been spent for rent, tools, and trips to another State in behalf of the corporation. An instruction to the jury was asked, that if the money "was used by the defendants in the furtherance of the business of the corporation with the intention that it should be applied to the payment of stock as cash, the certificate of stock to be issued later, then they would not be justified in finding that it was a liability of the company." *Held*, that the refusal of this instruction afforded no ground of exception. *Ibid.*

See DAMAGES, 4; DECEIT; EQUITY, 1-5; EVIDENCE, 5, 6; EXCEPTIONS, 17, 18; FALSE PRETENCES, 1; INSURANCE, 1, 4, 6.

FEE.

See DEED, 2; EASEMENT, 1, 2, 5; EQUITY, 7; SPECIFIC PERFORMANCE.

FINE.

See CONTEMPT, 4; CONTRACT, 4, 6.

FIRE INSURANCE.

See EVIDENCE, 8; INSURANCE, 5.

FORCIBLE ENTRY AND DETAINER.

1. If A. is a tenant not of B. but of C., or if having been a tenant of B. he has been ousted by C., having a paramount title, and then has remained in possession as C.'s tenant, B. cannot maintain an action on Pub. Sts. c. 175, to recover possession of the premises; but if A. remained the tenant of B. and there is evidence of this, then B. can maintain the action. *Hinckley v. Guyon*, 412.
2. Where, in an action for the recovery of land under Pub. Sts. c. 175, § 2, the plaintiff contended that the defendant was his tenant and not the tenant of the owner, but there was evidence for the jury that the defendant

was and remained the tenant of the plaintiff, the court said that it might be assumed that a certain written agreement between the owner and the plaintiff did not constitute a lease, but only an agreement for a lease for one or five years, at the option of the plaintiff. *Hinckley v. Guyon*, 412.

FORECLOSURE.

See MORTGAGE, 1.

FOREIGN CORPORATION.

1. The secretary of a Connecticut railroad corporation, which has no officer called a clerk, is a clerk within the meaning of § 2673 of the General Statutes of Connecticut, which requires notice of an action against a corporation to be given to its clerk. *Mack v. New York, New Haven, & Hartford Railroad*, 185.
2. By the statutes of Kansas the liability of a stockholder of a corporation there organized to pay the debts of the corporation is several, and may be enforced by an action against the stockholder in a court of competent jurisdiction in the State where the stockholder resides, and can be served with civil process. *Hancock National Bank v. Ellis*, 39.
3. In an action upon a judgment obtained against a corporation in Kansas, the agreed statement of facts upon which the case was submitted recited that the corporation "suspended payment of its debts and deposits"; that a receiver of the corporation was duly appointed by a court of that State; that the assets of the corporation were duly turned into cash and distributed by the receiver among the creditors; that all its assets were applied to the payment of its liabilities; and that the receiver was discharged about three years after his appointment. *Held*, that it appeared that the corporation "suspended business for more than one year," and never resumed business; and that the Gen. Sts. of Kansas of 1889, §§ 1200, 1204, were applicable to such a case. *Stebbins v. Scott*, 356.
4. The claim of a creditor of a Kansas corporation, who has obtained in that State a judgment against the corporation, which had "suspended business for more than one year," (Gen. Sts. of Kansas of 1889, §§ 1200, 1204,) and brings an action here upon the judgment to enforce the personal liability of a deceased stockholder of the corporation, the executor of whose will was appointed and qualified within two months after such suspension of business and more than two years before such judgment, is barred by the special statute of limitations, Pub. Sts. c. 136, § 9. *Ibid*.
5. Where a Kansas corporation "has suspended business for more than one year," although it has not been actually dissolved, assuming that the creditors have two remedies, one under § 1192, and one under §§ 1200, 1204, of the Gen. Sts. of Kansas of 1889, to enforce the personal liability of the stockholders, they are two remedies for the same cause of action. *Ibid*.
6. If the claim of an assignor in another State against the estate of a deceased person here, as a stockholder of a corporation there, was barred by

the special statute of limitations, Pub. Sta. c. 136, § 9, when it was assigned, the assignee cannot escape this bar by bringing a suit against the corporation in the other State, and then bringing an action here on the judgment there obtained; and he shows no cause of action within §§ 13 *et seq.* *Stebbins v. Scott*, 356.

See INSOLVENT DEBTOR, 2.

FOREIGN JUDGMENT.

1. In an action upon a judgment recovered in another State, the writ described the plaintiff as "the United States National Bank of New York, N. Y., . . . having its usual place of business in the city and State of New York." The plaintiff put in evidence certified copies from the comptroller of the currency of documents showing the incorporation and existence of a national bank under the name of "The United States National Bank of the City of New York," and also evidence tending to prove the identity of the bank that recovered the judgment with the present plaintiff, and that there was not in New York any other bank having the same or a similar name. The judgment roll recited that the judgment was rendered in favor of "The United States National Bank," and the complaint set forth that the plaintiff therein was organized under the National Bank Act, "and carrying on business in the city of New York as a National Bank." *Held*, that no material variance, if any, was shown; and that a finding for the plaintiff was warranted. *United States National Bank v. Venner*, 449.
2. If a judgment of a court of record of another State in an action on a promissory note is entered upon a confession by an attorney of such a court under a warrant executed by the defendant, appointing A., "or any attorney of any court of record," his attorney to enter his appearance at any time after the note became due to waive the service of process, and confess a judgment in favor of the plaintiff, but who was not otherwise authorized to appear for the defendant and confess judgment, and who was requested to appear by A., and whose appearance was really in the plaintiff's interest, there being no charge of fraud, or that judgment was entered for more than the note, or before the note was due, such judgment is entitled to full faith and credit here. *Van Norman v. Gordon*, 576.

FORFEITURE.

1. The facts that after default on a recognizance, which was entered into by a person arrested and brought before a police court upon a criminal complaint, and after the money deposited by him instead of giving a surety had been adjudged forfeited and had been paid to the treasurer of the county, the prisoner was recaptured on a capias issued by the police court, and was brought before that court, where he pleaded not guilty, waived an examination, and was ordered by the police court to be committed for trial before the Superior Court, where, upon indictment found, he was

afterwards tried, convicted, and sentenced, do not make void the judgment of the police court declaring the money forfeited. *Reed v. Police Court of Lowell*, 427.

2. Upon default of a person who has been arrested on a complaint for the larceny of thirty-five hundred dollars, and entered into a recognizance for his future appearance at a police court, and deposited the sum of seven thousand dollars instead of giving a surety, that court has authority to adjudge the money forfeited, and to order it to be paid to the treasurer of the county. *Ibid.*

See CONSTITUTIONAL LAW, 4 ; WAIVER, 2.

FRAUD.

See DAMAGES, 4 ; EQUITY, 2-7 ; EVIDENCE, 5, 6, 10, 11 ; EXCEPTIONS, 17, 18 ; FALSE PRETENCES, 1 ; FALSE REPRESENTATIONS ; HUSBAND AND WIFE ; INSURANCE, 1, 4, 6 ; MORTGAGE, 2.

FRAUDS, STATUTE OF.

1. The admissibility of a contract for the sale of chattels to prove value is not affected by the question whether it was good or bad under the statute of frauds. *Johnston v. Faxon*, 466.
2. A., having built a store for B.'s father, for which he was paid the contract price, furnished extra work and materials under orders given by B., and upon the strength of promises made by him to A. that he would see A. paid for the same. A. gave credit to B. and charged him with the items, and afterwards saw him about the claim, and B. did not object to paying it, but said he had no money to pay it with. *Held*, in an action by A. against B., that these facts warranted a finding that the bill was for B.'s own debt and not for the debt of his father, notwithstanding the further facts that B. was not pecuniarily benefited, that his father's payments were made at the hands of B., and that the father owned the building. *Phelps v. Stone*, 355.

See SALE, 2.

GIFT.

See HUSBAND AND WIFE ; TRUST AND TRUSTEE, 2.

GLOUCESTER.

See CITY, 3.

GOODS SOLD.

See ESTOPPEL, 1 ; INSOLVENT DEBTOR, 1 ; PRINCIPAL AND AGENT, 3.

GRADE CROSSING.

1. As part of the "total actual cost of the alterations" prescribed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway in a city by a railroad, the cost of a new station there cannot be allowed, but only what the expense of altering the old station and lowering it to meet the tracks and providing suitable approaches would have been; nor the cost of a ninety-five pound rail to replace a seventy-two pound rail in use before the alterations, but only the expense of a new seventy-two pound rail as laid, less the value of the old rails; nor an amount as an investment return for the use of the railroad in removing material and for interference with its other traffic. *Newton, petitioner*, 5.
2. Although the language of St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," is that the report of the auditor when confirmed by the court shall be final, still it is not to be construed as taking away the general authority of a single justice to report to the full court questions of law arising in equity. *Providence & Worcester Railroad, petitioner*, 117.
3. Expenses incurred by a town in employing counsel to appear at hearings in the Superior Court in opposition to the appointment of a commission to make separation of a grade crossing under St. 1890, c. 428, to represent the town in the selection of commissioners after the decision of the courts to appoint, to oppose before the commission any abolition whatever, and to advocate before the commission, after its decision to abolish the crossing, a different plan of separation from that presented by the railroad company, and expenses incurred by it in employing a civil engineer to prepare and present plans to the commission, which were not adopted, it appearing that the town, by vote at a town meeting, appointed a committee with authority to employ counsel and an engineer for the purposes stated, and that the reasonableness of the charges was not in dispute, cannot be allowed by the auditor as part of the "cost of the hearing," under § 3 of the statute, or as part of the "expense incurred by the town," under § 7, to be apportioned between the railroad company, the Commonwealth, and the town. *Ibid.*
4. Where a railroad excavates the land along the line of its new location to the depth of about fifteen feet below the level of its former roadbed, and thereby permanently drains the well of A. on his land, a short distance away from the land taken and separated from it by the land of other persons, A. suffers damage from the taking of land for use as a railroad within the meaning of St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings"; and under St. 1891, c. 123, the damage is of a kind which would entitle him to compensation if occasioned by the taking of land for locating and laying out a railroad. *Sheldon v. Boston & Albany Railroad*, 180.

See NEGLIGENCE, 2-4; REPORT.

GRANT.

See DEED; EASEMENT; HUSBAND AND WIFE; TENANTS IN COMMON, 1.

GUARDIAN AND WARD.

1. In an action for the breach of a guardian's bond an assessor's report may be treated as in the nature of a master's report. *Forbes v. Ware*, 306.
2. Even if it is assumed that the administrator of a ward's estate can bind it by an agreement with the guardian that it shall be liable to the guardian for the support and maintenance by her of the children left by the ward, yet the contention, in an action for the breach of the bond, that the amount so expended is to be treated as set-off and payment cannot avail, if there is nothing to show that any such agreement was entered into, either in the facts agreed to at the hearing before the master or in the evidence that was offered and excluded, and there is nothing from which such an agreement can be implied. *Ibid.*
3. In an action against the administrator of a guardian for the breach of her bond, the fact that the husband of the ward had no property except such as he would receive from his wife's estate has no tendency to show that the guardian had a valid claim against the estate of the ward for the support and maintenance of the children of the ward after her death. *Ibid.*
4. The fact that a guardian mingled the property of the ward's estate with his own, used it the same as his own, and neglected to pay it over, does not, in an action of contract for a breach of the bond, justify, without anything more appearing, the imposition of compound interest at the rate established by law in this Commonwealth for simple interest. *Ibid.*

See EVIDENCE, 2, 3.

HABEAS CORPUS.

See EXCEPTIONS, 1; SENTENCE.

HEALTH.

See CITY, 1-4; SEWER, 5.

HEIR.

See DEVISE AND LEGACY.

HIGHWAY.

1. The remedy given by § 3 of St. 1894, c. 497, entitled "An Act relating to State highways," which section provides that compensation to owners of adjoining lands for injuries to such lands is to be paid by the Commonwealth, after being determined in the manner provided in that section, is adequate and complete, and excludes all other remedies. *Golding v. North Attleborough*, 223.
2. Where, in an action for personal injuries occasioned to the plaintiff by collision with shade trees on a public highway, it is not contended that the

accident was due to any defect in the trees themselves, and there is nothing to show that there has been any change since the road commissioners located the trees, the law declares that they do not incommode or endanger the public travel, and this decision cannot be revised by a jury. *Washburn v. Easton*, 525.

3. If a depression about two feet wide and three feet long appears in that part of a highway in a city through which a pipe has been laid by its water department, the trench dug for the purpose of laying the pipe having been filled, and there having been an unusual rain storm immediately preceding the accident, and the depression being filled with water in an action against the city for injuries caused by the depression it cannot be said, as matter of law, that the jury were not warranted in finding that the settling of the earth was due to negligent filling; and it is also a question for the jury whether, if the trench was properly filled, its subsequent defective condition arose during the progress of the work so as to render the city liable for negligence in not guarding the trench. *Johnson v. Worcester*, 122.
4. In an action against a town for personal injuries received while driving upon an ancient highway, it appeared that the way did not extend to the fences on the side, and in it was a muddy place with standing water, causing travel to turn to one side of the road over the grass to such an extent that a strip three or four feet wide was worn bare and looked like the rest of the road, and came up to within one inch of the stump of a pole about ten inches high and six inches in diameter, which was hidden by the grass that remained; and that the wheel of the plaintiff's vehicle struck against the stump, and he was thrown out. *Held*, that the jury would be warranted in finding that the stump was within the highway, and was a defect. *Tilton v. Wenham*, 407.
5. At the trial of an action for personal injuries occasioned to the plaintiff by the collision of the carriage in which he was riding with a stone in a highway of the defendant town, the judge, after stating to the jury that it was the duty of the defendant to keep the way reasonably safe and convenient for travellers, and to "work sufficient width" for that purpose, submitted to them, under instructions to which no exception was taken, the questions whether a sufficient width was worked, whether the stone was a defect, and whether there was negligence on the part of the defendant in allowing it to be there, or in allowing the grass and weeds to grow around it. Then, after defining the degree of due care required of the plaintiff, he instructed the jury, in substance, that if the plaintiff, without any reasonable cause therefor, knowingly drove out of the way prepared for travel, or if he carelessly allowed the horse to get out of it, and in that way was injured by contact with the stone, he could not recover. *Held*, that the instructions were correct. *Carey v. Hubbardston*, 106.

See CONSTITUTIONAL LAW, 2; EVIDENCE, 19, 20; GRADE CROSSING;
REPORT; STREET RAILWAY; TOWN, 1.

HOLYOKE.

See CITY, 6.

HORSE.

At the trial of an action for personal injuries caused by the kick of a horse, it appeared that the wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that the horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk at right angles to it; and as the plaintiff approached, he suddenly whirled round and kicked him. *Held*, that it was unnecessary to prove that the horse was vicious, and that the refusal to direct a verdict for the defendant was correct. *Hardiman v. Wholley*, 411.

See CRUELTY TO ANIMALS; NEGLIGENCE, 1.

HUSBAND AND WIFE.

1. Where a husband conveys land to his wife, the presumption is that it is a gift to her, and, although the presumption may be rebutted by evidence, the facts that the transfer, which was without pecuniary consideration, was made for the purpose of having the property stand in the wife's name instead of the husband's, that after such conveyance the husband and wife joined twice in mortgaging the property to raise money for his business, that at all times the insurance on the house upon the premises was taken out in his name as owner, and was never assigned to her, and that all payments of interest on a prior mortgage were made by the husband's check, are not sufficient to overcome the presumption. *Jaquith v. Massachusetts Baptist Convention*, 439.
2. If, at the time when a husband conveys land to his wife without pecuniary consideration, he owed business debts, but it does not appear that he was insolvent or in contemplation of insolvency, nor that there were any creditors then existing who had not since been paid whatever at that time was due them, nor that there was not left in his hands sufficient to pay his creditors as their claims matured, and it does appear that he actually did pay until more than a year afterwards, the conclusion that the conveyance was made for the purpose of delaying or defrauding creditors is not warranted, and the conveyance will not be held to be void as to them; and the facts that, after the conveyance, the husband and wife joined twice in mortgaging the property to raise money for his business, that at all times the insurance on the house upon the premises was taken out in his name as owner, and was never assigned to her, and that all payments of interest on a prior mortgage were made by the husband's check, do not show that the property ever thereafter passed to him. *Ibid.*

See CONTRACT, 1; DIVORCE; EVIDENCE, 22; GUARDIAN AND WARD, 8; MARRIED WOMAN; MORTGAGE, 2; PARTIES, 2; PRINCIPAL AND AGENT, 3; USE AND OCCUPATION.

ILLEGALITY.

See FALSE PRETENCES, 1, 2.

IMPLIED CONTRACT.

See GUARDIAN AND WARD, 2.

IMPRISONMENT.

See CONSTITUTIONAL LAW, 1.

INDEMNITY.

See BOND, 3, 4; EVIDENCE, 9.

INDICTMENT.

See EVIDENCE, 6; EXCEPTIONS, 17; FALSE PRETENCES; FORFEITURE, 1;
RAPE; VARIANCE.

INDORSEMENT.

See PROMISSORY NOTE.

INFANT.

See MASTER AND SERVANT, 7; MONEY HAD AND RECEIVED;
NEGLIGENCE, 1.

INJUNCTION.

One who has sold bricks upon his own land, to be removed within a certain time, cannot maintain a bill for an injunction against the purchaser's removing them at a later date. *Gates v. Johnston Lumber Co.* 495.

See CITY, 6.

INSANITY.

See EXCEPTIONS, 16.

INSOLVENT DEBTOR.

1. Accepting a preference in payment for goods sold to an insolvent after his creditors have given him an extension of time is not a bar, under Pub. Sta. c. 157, § 33, to proof of a claim upon a note given for an old debt when the extension was granted. *Smith v. American Linen Co.* 227.

2. A corporation of another State, having its main establishment there, is not affected by a discharge here of a Massachusetts debtor, although the corporation has a place of business here and a license under Pub. Sts. c. 100, § 10, and has appointed the commissioner of corporations its attorney for service of process under St. 1884, c. 330, § 1. FIELD, C. J. dissenting. *Bergner & Engel Brewing Co. v. Dreyfus*, 154.

See BANKRUPTCY; BOND, 4; DISCHARGE; EVIDENCE, 10, 11;
HUSBAND AND WIFE, 2; MORTGAGE, 1.

INSTRUCTIONS.

See CRUELTY TO ANIMALS; DOG; EMPLOYERS' LIABILITY ACT, 2;
EXCEPTIONS, 2, 3, 16, 19, 21, 23; FALSE PRETENCES, 8; FALSE REPRESENTATIONS, 4, 5; HIGHWAY, 5; NEGLIGENCE, 1, 4; VERDICT.

INSURANCE.

1. Where, in an action upon a policy of life insurance, there are discrepancies of substance between the original application and the copy annexed to the policy, a finding that the copy so annexed is not a correct copy within the meaning of § 21 of St. 1890, c. 421, entitled "An Act relating to assessment insurance," and a ruling that defences founded upon alleged misrepresentations in the application are not open to the defendant, are correct. *Nugent v. Greenfield Life Association*, 278.
2. The St. 1894, c. 225, relative to actions on life insurance policies, is construed to allow an executor or administrator to sue when the assent of the beneficiary to whom the policy is payable appears or is to be presumed, no action being instituted by the beneficiary himself. *Brown v. Greenfield Life Association*, 498.
3. In an action on a life insurance policy there is no error in the ruling that the jury are to disregard those questions in the applications to which no answer was made. *Ibid.*
4. Consumption is a disease of such a nature that, as matter of law, a misrepresentation as to it in an application for life insurance is a misrepresentation as to a matter which increases the risk of loss. *Ibid.*
5. A policy of insurance against loss by fire was issued, containing a condition making it void if the property remained vacant for more than thirty days without the assent of the insurer. The premises were leased, and were unoccupied for four months preceding a loss by fire. There was a local board of underwriters, which was a voluntary association of agents of insurance companies doing business in W., the powers and duties of which were purely to establish rates of insurance and classify risks to which rates should be applied. The board kept in each insurance office in W. a card cabinet to which the agents who used the office had access. The cards in these cabinets stated the classification of risks and the rates established by the board, and before a risk was insured the agent was

expected to consult the cards for information as to the classification and rate. When the policy in question was written the property had not been classified by the board, no rate had been established, and no card relating to it had been placed in the cabinet; but such classification and rate were made three days later. The insurer had as agent in W. a partnership composed of several members, one of whom was an officer of the board, and he and another member of the firm were present at a meeting of the board when it was voted that "permission be granted, free of charge, for the" property in question "to be unoccupied a portion of the year," a rule of the board requiring a charge for vacancy; and a printed card was issued accordingly and placed in each cabinet, including that in the office of such firm, which knew of the passing of the vote, the issuing of the card, and that it was placed in their cabinet. The action of the board was not communicated to or known by the owner or tenant of the property, neither of whom had applied for a vacancy permit. *Held*, in an action on the policy, that the action of the board was not a permission for non-occupancy, or a waiver of the condition in the policy, and did not estop the defendant from relying on the breach of the condition as a defence. *Quinsigamond Lake Steamboat Co. v. Phoenix Ins. Co.* 367.

6. In an action upon a policy of insurance against disability, the sole defence being that the plaintiff omitted to state in his application for insurance the fact that about fifteen years before he had sprained his left ankle, so that he applied to it some liniment and it troubled him for three or four hours, although the defendant's examining physician testified that a sprain never fully recovers, that such an injury to one leg would make an injury to the other leg more probable fifteen years afterwards, and that, if the insurer had been informed of the previous sprain it would not have written a policy covering injuries to the ankle, it is competent for the judge, sitting without a jury, to find that the plaintiff's omission to state the previous sprain was not a misrepresentation which increased the risk of loss; and evidence that the plaintiff did state the fact of the former sprain to the agent who assisted him in making out his application, and did not put it in the application because the agent said it was too trifling and so did not write it down, would further justify a finding that the omission was not made with actual intent to deceive. *Tyler v. Ideal Benefit Association*, 536.

See ACTION, 1; ADMISSIONS, 2; ESTOPPEL, 2; EVIDENCE, 5, 8;
EXCEPTIONS, 13; HUSBAND AND WIFE; WAIVER.

INTENTION.

See CRUELTY TO ANIMALS; DECEIT; FALSE PRETENCES, 6.

INTEREST.

See GUARDIAN AND WARD, 4; HUSBAND AND WIFE.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 3, 4.

INTOXICATION.

See EVIDENCE, 19; PASSENGER, 1, 2.

JOINDER.

See DISCHARGE.

JUDGE.

See APPEAL, 3; AUDITOR; BASTARDY, 4; CONTEMPT, 2, 3; EMPLOYERS' LIABILITY ACT, 2; EQUITY, 8; EVICTION; EVIDENCE, 1, 9, 21; EXCEPTIONS, 4, 5, 16, 19, 20, 21, 23; EXPERT; FALSE PRETENCES, 8; GRADE CROSSING, 2; HIGHWAY, 5; INSURANCE, 6; MECHANIC'S LIEN, 1; NEGLIGENCE, 4, 12; NEW TRIAL; PHOTOGRAPH; TITLE; TRIAL, 1, 8.

JUDGMENT.

See ANSWER; APPEAL, 1, 2; CONTRACT, 6; DISCHARGE; FOREIGN CORPORATION, 3, 4, 6; FOREIGN JUDGMENT; FORFEITURE, 1; RAILROAD, 2; SET-OFF.

JURISDICTION.

See BANKRUPTCY; FOREIGN CORPORATION, 2; FOREIGN JUDGMENT, 2; RECOGNIZANCE; SENTENCE.

JURY.

See ACTION, 1; ADMISSIONS, 3; BASTARDY, 4; CONTEMPT, 3; DOG, 1; EMPLOYERS' LIABILITY ACT, 2, 7-9; EVICTION; EVIDENCE, 20; EXCEPTIONS, 12, 19-23; FALSE PRETENCES, 3, 8; FALSE REPRESENTATIONS, 2, 4, 5; HIGHWAY, 2, 8; INSURANCE, 3; MASTER AND SERVANT, 2, 3, 8, 9; MECHANIC'S LIEN, 5; NEGLIGENCE, 2, 5, 10, 11, 13; NEW TRIAL; PHOTOGRAPH; PRINCIPAL AND AGENT, 3; SEWER, 2; TOWN, 1; TRIAL, 2-5.

LANDLORD AND TENANT.

1. If a tenant at will does not give a proper and legal notice sufficient to determine the tenancy, and the landlord does not accept the surrender of the premises, the tenancy is not determined by the tenant vacating the premises. *Taylor v. Tuson*, 145.

2. Where, in an action for personal injuries, it appears that the defendant was a landlord, who maintained outside steps and a platform for the use in common of tenants of different parts of the building, and that the plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to come on a particular day for a particular purpose, a verdict for the plaintiff will not be disturbed, as he was using the platform in the tenant's right. *Coupe v. Platt*, 458.
3. Where the owner of a building let to a tenant, who sublets a portion of it, agrees to make the outside repairs, he is not liable to an action for personal injuries caused to a member of the subtenant's family by a want of repair in an outside stairway, if he has had no notice of such want of repair. *Marley v. Wheelwright*, 530.

See EVICTION; FORCIBLE ENTRY AND DETAINER; LEASE;
USE AND OCCUPATION.

LAW AND FACT.

See ACTION, 2; ADMISSIONS, 3; CONTRACT, 9; DOG; EMPLOYERS' LIABILITY ACT, 8, 9; EQUITY, 8; EVICTION; EXCEPTIONS, 5; FALSE REPRESENTATIONS, 2; HIGHWAY, 2, 3; INSURANCE, 4; MASTER AND SERVANT, 2, 8, 9; NEGLIGENCE, 2, 10-12; RAPE; SALE, 8; SEWER, 2.

LEASE.

If a building, a portion of which is leased during the "life of the building," is so injured by fire as substantially to destroy the part demised and to render it impracticable for the lessee to perform the covenant to rebuild such part except by rebuilding other important parts of the building not demised, the "life of the building" may be said to have terminated, within the meaning of the lease. *Ainsworth v. Mount Moriah Lodge*, 257.

See EVICTION; EVIDENCE, 8; FORCIBLE ENTRY AND DETAINER, 2.

LEGACY.

See DEVISE AND LEGACY; ESTATES OF PERSONS DECEASED.

LIBEL.

See DECLARATION; EXCEPTIONS, 22.

LICENSE.

See CITY, 5.

LIFE ESTATE.

See EQUITY, 7.

LIFE INSURANCE.

See ACTION, 1; ESTOPPEL, 2; EXCEPTIONS, 13; INSURANCE, 1-4;
WAIVER.

LIMITATIONS, STATUTE OF.

See ADVERSE POSSESSION; FOREIGN CORPORATION, 4, 6; PRESCRIPTION;
RAILROAD, 2.

MARRIED WOMAN.

A married woman is civilly responsible for personal injuries inflicted not in her presence upon a third person by her husband while acting within the scope of his authority as her agent. *Shane v. Lyons*, 199.

See PARTIES, 2; PRINCIPAL AND AGENT, 3; USE AND OCCUPATION.

MASTER AND SERVANT.

1. A railroad corporation is not liable for injuries sustained by an experienced person in its employ, while attempting to couple two cars together by the use of a link and pin, in obedience to orders, because the drawbars of the cars, one of which belonged to another corporation, were of unequal height, causing one drawbar to slide over the other, and such person, who held the link, to be crushed between the sills of the cars. *Ellsbury v. New York, New Haven, & Hartford Railroad*, 130.
2. If a brakeman in the employ of a railroad corporation is ordered to couple to a train a flat car loaded with stones which lay on the floor of the car unsecured with cleats, stakes, or blocking, as was customary, and while so coupling it is injured by having his arm caught by one of the stones which was forced over the edge of the car by the concussion caused by the cars coming together, in an action for his injury it cannot be held, as matter of law, that he was negligent in failing to observe that the stones were unsecured, or that the risk was so obvious that he assumed it, but these questions are for the jury, who will be warranted in finding that he was in the exercise of due care. *Austin v. Fitchburg Railroad*, 484.
3. Where a railroad corporation has in its possession for nearly a week a flat car, originally loaded with stones by it, and then orders the car to be coupled to a freight train for transportation to a point farther along upon its road, if the stones are not secured with cleats, stakes, or blocking, as was customary, and a brakeman in its employ while coupling the car is injured by having his arm caught by one of the stones which was forced over the edge of the car by the concussion caused by the cars coming together, in an action for the injury, the jury are warranted in finding that the corporation was negligent in furnishing for transportation a car loaded in a dangerous manner. *Ibid.*
4. An electric lighting corporation owes no duty to the linemen in its em-

ploy to inspect, below the surface of the ground, the poles upon which its wires are suspended to see whether they are decayed, but a lineman, when he enters its service, assumes the risk of an old pole breaking and falling when he is working upon it, if he does not take measures to ascertain its condition before going upon it, and he cannot maintain an action against the corporation for personal injuries sustained from that cause ; and evidence that the corporation had made no inspection of the pole prior to the accident is immaterial. *McIsaac v. Northampton Electric Lighting Co.* 89.

5. A person of several years' experience, who is employed to work upon a moulding machine, and who is injured by having his hand come in contact with the revolving knives on the machine, which is an ordinary machine in perfect condition, cannot maintain an action against his employer for his injury, on the ground that he was negligently set to work upon a dangerous machine without warning him of the danger, because a guard, which is no part of the machine, but an appliance made by workmen using the machine without request or direction of the employer, was not so wide as one which he had previously used elsewhere, and did not cover the whole sweep of the knives ; and evidence of experts to show that this machine was in their opinion very dangerous is rightly excluded. *Gleason v. Smith*, 50.
6. A workman, who was on a platform three feet lower than a revolving shaft, which was about thirteen feet from the floor, trying to throw a belt off a pulley at the end of it, on the other side of the bearing and one foot distant from a set screw fastening a collar near the end of the shaft, was caught by the screw and injured. The screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room and oiled the shaft and bearing, he never had seen this screw. There were other similar screws in the place, and there was not much light. *Held*, that he could not maintain an action against his employer for his injury, either at common law or under the employers' liability act, St. 1887, c. 270. *Ford v. Mount Tom Sulphite Pulp Co.* 544.
7. An action cannot be maintained, either at common law or under the employers' liability act, St. 1887, c. 270, for personal injuries sustained by a boy eighteen years old, who, in the performance of his duties as an apprentice in a machine shop, while oiling the bearing of a revolving shaft, is caught by a projecting set screw which fastens a collar to the shaft near the bearing. *Demers v. Marshall*, 548.
8. A. reported the defective condition of a machine upon which he was working to his employer, who sent B. to fix it. B. made a slight repair upon it, but did not remedy the real defect, although promising on that and a later occasion to do so. A. then called it to the attention of the foreman of the room, who examined it, and promised to have it fixed at once. Work was stopped in that part of the shop for several days afterwards, and upon A.'s return to work he used the machine and was injured by reason of the defect. *Held*, in an action both at common law and under the employers' liability act, St. 1887, c. 270, against his employer for his injury, that he was entitled to go to the jury, who would be war-

- ranted in finding that the defendant was negligent, and that the plaintiff was in the exercise of due care in resuming work upon the machine without making a particular examination of it. *Keevan v. Walker*, 58.
9. A., who was employed in an iron foundry as a moulder, was ordered with others to assist in pouring melted iron into a mould for a very large casting. The men stood on a platform two feet high built near the mould. The ladle, which was swung into position over the mould by a derrick, contained about two and one half tons of melted iron, which filled it more than one half. The arms of the ladle were attached a few inches below the centre of gravity, and a common round stick, furnished by the superintendent, without holes in it, was used as a lever, being placed over one handle and under the other handle of the arm on one side. This ladle was used infrequently, and A. had never seen it before. When the order was given to pour, the men began to tip the ladle, which overturned suddenly, emptying its contents on the floor, and the men jumped from the platform, and in the struggle to escape A. was thrown into the hot iron and injured. *Held*, in an action against his employer for his injury, that the case was rightly submitted to the jury. *Flaherty v. Norwood Engineering Co.* 134.
10. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the fall of a plank on which the plaintiff was sitting while at work, and which was part of a temporary staging built to be used, and which had been used for six months by workmen in finishing the interior of a room in a building under construction, the fall being caused by the giving way of one of the brackets on which the plank was laid, by reason of the splitting of the boards composing the bracket where it was nailed to an upright, if the evidence does not tend to show that the defendant furnished the staging as a structure, nor that he assumed to exercise any control or supervision as to how it should be built or kept or adapted for the work, nor that he failed to furnish a sufficient quantity of suitable materials, nor that he employed improper workmen, the mere fact of the giving way of the bracket does not warrant the inference of negligence on his part. And the plaintiff would seem to have been in the exercise of reasonable care, and not to have been aware that he was exposed to any risks except those incident to working upon a safe staging. *Brady v. Norcross*, 331.
- See ACTION, 3, 4 ; ADMISSIONS, 2, 3 ; CONTRACT, 4, 6-9 ; DAMAGES, 1 ; DECLARATION ; DEPOSITION ; EMPLOYERS' LIABILITY ACT : EVIDENCE, 12, 13, 16-18 ; PARTIES, 1 ; RAILROAD, 2 ; TOWN.

MASTER IN CHANCERY.

See GUARDIAN AND WARD, 1.

MAYOR.

See CITY 2.

MECHANIC'S LIEN.

1. If the state of the evidence at the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, is such that upon the questions involved the justice, sitting without a jury, is justified in finding either for the petitioner or the respondent, and finds for the latter, his action cannot be disturbed or reversed. *Morse, Williams, & Co. v. Ellis*, 378.
2. At the trial of a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for materials furnished under a contract to furnish at defined prices all the lumber to be used in the erection of a house, the petitioner testified that the owner told him that the floor boards were not holding out; that the petitioner and the owner went to the house and measured them, and it appeared that the owner had made a mistake in his measurements in the first place, which he admitted; and that the petitioner told him to come and get the balance, which he did. This material appeared as the last two items in the account under a date four months after the first date. *Held*, that the evidence warranted a finding that these two items were for lumber furnished in accordance with the original contract. *Sprague v. McDougall*, 553.
3. An agreement with the owner of land, to furnish him at defined prices with all the materials of certain specified kinds to be used in the construction of a house thereon, is a contract under which a mechanic's lien, under Pub. Sts. c. 191, can be established for materials furnished after, as well as before, the recording of a mortgage of the land. *Ibid*,
4. That the work was done and the materials were furnished in the erection of several houses under one contract with the owner of a tract of land, which has no visible divisions, warrants a finding, if not a ruling, that the whole tract is one lot, and that there is a mechanic's lien, under Pub. Sts. c. 191, § 1, upon the whole of it for the whole sum due. *Orr v. Fuller*, 597.
5. When a contract for furnishing work and materials in the erection of a building is broken by the owner of the land, it is error, under Pub. Sts. c. 191, § 23, to allow the jury, at the trial of a petition to enforce a mechanic's lien, to find the fair value of the work and materials, if it exceeds the contract price less the work not done. *Ibid*.

MEMORANDA.

Resignation of Mr. Justice Charles Allen, 16.

Appointment of Mr. Justice John Wilkes Hammond, 16.

MERGER.

See DISCHARGE; EQUITY, 4.

MILLS AND MILL-OWNERS.

See EASEMENT, 4, 5.

MINOR.

See MASTER AND SERVANT, 7; MONEY HAD AND RECEIVED;
NEGLIGENCE, 1.

MISTAKE.

See EQUITY, 1.

MONEY HAD AND RECEIVED.

A., a minor, subscribed and paid for ten shares of the capital stock of a corporation, which never issued any certificates and never carried on the business for which it was organized. The subscribers to its stock voted to form a new corporation, and such corporation was subsequently formed. It was agreed between the two corporations that the new one should pay the old one a certain sum for all its property, and that the old one should pay back a certain part of that sum, in consideration of which the new one agreed to issue certificates of its stock to that amount to the subscribers for stock of the old one, each of them to have a certificate of stock in the new one for the same number of shares paid for by him to the old one. These agreements, of which A. had knowledge, were fully carried out by the two corporations, and the new corporation issued to A. a certificate for ten shares of its stock. He afterwards tendered back to that corporation the certificate, and demanded his money. *Held*, that he could not maintain an action against that corporation for money had and received. *White v. Mount Pleasant Mills Corp.* 462.

MORTGAGE.

1. A mortgage, which comes within the terms of St. 1888, c. 393, providing that "a mortgage of real estate recorded more than four months after its date shall not be valid as against an assignee in insolvency of the estate of the mortgagor appointed in proceedings in insolvency begun at any time after the date of the mortgage and before the expiration of one year from the recording thereof," and which is avoided by an assignee in insolvency of the estate of the mortgagor, is void from its inception, and incapable of being the foundation of any rights in any mortgagee or vendee at a foreclosure sale. *Pratt v. Mackey*, 884.
2. Where land has been conveyed by a husband to his wife, and by them mortgaged to a third person in order to prevent it from being reached by the husband's creditors, it is not necessary, in order to maintain a bill in equity to redeem the land, to show that the transaction has been purged of the fraud which led to the conveyance and mortgage; but if accountings have taken place between the mortgagors and a third person, who is found to have an equitable claim under the mortgage as security for an amount due him from them, such accountings must be regarded as settling the amounts due under the mortgage when they were had, and the

objection that they related to sums advanced subsequently to the giving of the mortgage cannot prevail, if it is found that it was understood and agreed between the parties that the mortgage should stand as security for such sums. *Pierce v. Le Monier*, 508.

See DEED, 2; EQUITY, 7; EVIDENCE, 4; EXCEPTIONS, 11; FALSE REPRESENTATIONS, 1; HUSBAND AND WIFE; MECHANIC'S LIEN, 3; PARTIES, 2.

MUNICIPAL CORPORATION.

See CITY; CONSTITUTIONAL LAW, 3, 4; HIGHWAY, 2-5; TOWN.

MUNICIPAL COURT.

See FORFEITURE.

NAME.

See FOREIGN JUDGMENT, 1.

NATIONAL BANK.

See FOREIGN JUDGMENT, 1.

NEGLIGENCE.

1. If a young boy is injured by the kick of a horse, which he is approaching, not as a traveller on the way, but for the purpose of reaching and touching him, in an action against the owner of the horse for the injury, it being in dispute whether the accident occurred on the sidewalk of the way or in the defendant's adjoining barnyard, the defendant is entitled to a ruling that the "question of the sidewalk" is immaterial. *Bowler v. O'Connell*, 189.
2. In an action against a railroad corporation for causing the death of the plaintiff's intestate at a grade crossing, by failure to give the signals required by Pub. Sts. c. 112, §§ 163, 213, it cannot be ruled, as matter of law, that gross negligence on the part of the plaintiff's intestate was proved, if, while the evidence tended strongly to show that the intestate was negligent, some of the important circumstances bearing on his conduct were in doubt. The jury alone could authoritatively determine them. *Phelps v. New England Railroad*, 98.
3. The use of the words "gross negligence" in Pub. Sts. c. 112, § 213, shows that the Legislature intended a materially greater degree of negligence than the mere want of ordinary care. *Ibid.*
4. In an action against a railroad corporation under Pub. Sts. c. 112, § 213, for personal injuries caused by a collision of the defendant's engine with a sleigh in which the plaintiff was riding at a grade crossing, he and his

companion, who was driving, testified that, when within twenty-five or thirty yards of the crossing, they stopped and listened, but heard no sound of an approaching train. There was evidence tending to show that the whistling post was nearer the crossing than the distance prescribed by the statute; and the engineer and fireman of the train and other witnesses testified that the whistle was blown at the whistling post, and that the whistle and bell were sounded alternately to and over the crossing. The judge instructed the jury, among other things, as follows: "If you are satisfied that the failure to give those signals contributed to the injury, and if you find there was not gross negligence on the part of the plaintiff, or the person who was driving him, contributing to the injury, it is entirely within your province to infer from those facts that the failure to give the statutory signals did contribute to the injury to the plaintiff." *Held*, that the instruction was not open to exception. *Duggan v. New England Railroad*, 337.

5. If a passenger, while alighting from a railway car at a station, is injured by a sudden movement of the car, which is not explained, and which the jury, in an action for the injury, therefore has a right to attribute to the negligence of the railroad corporation, the defendant is not entitled to successive rulings that there was no evidence of negligence on the part of the several servants of the corporation by some one of whom the movement must have been caused. *Pomeroy v. Boston & Maine Railroad*, 92.
6. If the sudden movement of a railway car, while a passenger is alighting therefrom at a station, and using due care, is caused by letting off the air in the brake, the railroad corporation may be liable to him for the result of the act, unless there was no way to avoid letting the air off in the manner in which it was let off, although the way adopted was the usual and proper way. *Ibid*.
7. In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, the defendant is not entitled to a ruling that "the act of the brakeman in calling the station and the actual stopping of the train are not evidence to warrant a finding that the defendant negligently led the plaintiff to suppose the train had reached the place for him to alight," there being other circumstances bearing upon the question whether the plaintiff supposed the train had reached such place, and has no ground of exception to the ruling that "the act of the brakeman in calling the station and the actual stopping of the train are to be considered by you in connection with the care which it was necessary for the plaintiff to use in the exercise of his senses to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for him to alight." *Barry v. Boston & Albany Railroad*, 109.
8. In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, a ruling requested by the defendant, that "the action of the brakeman in calling the station was not an invitation to alight from the train at all, or, if it was, it was not an invitation to alight from the train until it had come to a stop at the station where it was designed to discharge the passengers," is fairly covered by the ruling that "he was bound to use due care to ascertain whether the

train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped; he must use his senses." *Barry v. Boston & Albany Railroad*, 109.

9. If the declaration in an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train alleges that "at or near the station at S. the defendant's employee called out in the car in which the plaintiff was seated, 'S.,' and thereupon the said car stopped and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car," and that, as he was on the point of doing so, the train suddenly started and he was thrown to the ground and injured, the defendant is not entitled to a ruling that "on the pleadings and evidence in this case there can be no recovery unless the train had come to a stop at the place designed for passengers to alight," and proof that the train stopped elsewhere than at such place is no variance. *Ibid.*
10. In an action against a railroad corporation for personal injuries sustained by a passenger while alighting from a train, the defendant is not entitled to a ruling that "the evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight," if the evidence is conflicting upon that point, but the effect of the whole evidence is for the jury, and it cannot be said, as matter of law, that they were not justified in reaching the conclusion which they did. *Ibid.*
11. A woman and her daughter were invited to join a party upon an excursion, and the former accepted the invitation on condition that she might pay one half the cost of the carriage, and made such payment. The party, consisting of four persons, occupied a two-seated carriage drawn by two spirited horses. The daughter, who was nineteen years old and of slight build, and had had very little experience in driving, was allowed to drive the horses. In returning from the excursion the carriage formed part of a long procession of carriages, and upon reaching a level stretch after coming down an incline in the road, the pole of the carriage entered the back of a carriage in front of it and injured a person therein. A by-stander, who knew the mother and daughter, called out to them, "What are you trying to do?" The daughter replied, "Well, I can't hold them," and the mother said, "She's all right." Subsequently the mother tried to conceal from the injured person the identity of the occupants of the carriage. *Held*, in an action against the mother and daughter for the injury, that the question of the mother's liability was rightly submitted to the jury; and that the evidence of the admissions was also for the jury. *Adams v. Swift*, 521.
12. In an action against a street railway company for personal injuries, it appeared that the plaintiff was thrown from a wagon in consequence of the horse attached thereto being frightened by the sounding of a gong on one of the defendant's cars, and by noise and sparks caused by the wheels of the car running over what the plaintiff believed to be pebble stones. The plaintiff testified that the horse was four or five yards from the car,

and that the motorman rang the gong half a dozen or a dozen times. There was nothing to show that the noise and sparks were due to any defect in construction or negligence in operation, and up to the moment of the accident there was nothing in the behavior of the horse which rendered it negligence on the part of the motorman to ring the gong. *Held*, that the judge rightly directed a verdict for the defendant. *Henderson v. Greenfield & Turner's Falls Street Railway*, 542.

18. At the trial of an action for personal injuries occasioned to the plaintiff by the collision of the wagon in which he was riding with an electric car of the defendant at the point of intersection of M. and P. Streets, the former of which ran east and west and the latter north and south, it appeared that the car was going slowly; that the plaintiff was nearly across the track at the time of the collision; that there was a high board fence on the southerly side of M. Street at its junction with P. Street, which was an obstruction to the plaintiff's westerly view of M. Street until he reached a point fifteen feet southerly of the south rail of the railway track in that street; that he looked up M. Street and saw nothing; that he heard no gong or bell; that he was going "a little faster than a walk," and "slowed up a little before he got on to the track"; and that "when he got on to the track he hurried up his horse." *Held*, that there was evidence for the jury that the plaintiff was in the exercise of due care. *Lahti v. Fitchburg & Leominster Street Railway*, 147.

14. Where a street railway ran upon the right hand side of a highway laid out over marsh land, there was a footpath for travellers on the right hand side only of the track, and a wooden fence on the right hand side of the path. A., who was walking on the path in a dark night, the road being muddy and the wind blowing from the sea in his face, stopped twice within a distance of less than seven hundred feet, looking and listening to see and hear if anything was coming, and saw and heard nothing. At a point from two to three hundred feet beyond the place where he last looked, he was struck and injured by a car going in the same direction at the rate of twenty to twenty-five miles an hour, where there was a space of about twenty inches between the car and the fence. The way was not lighted, the headlight of the car was a small kerosene lamp, and he did not hear any sound before he was struck; the car went from one hundred to one hundred and twenty feet after it struck him, and the motorman was facing to the left and talking with a passenger. *Held*, in an action by A. against the railroad corporation for his injury, that there was evidence of due care on his part. *Carlson v. Lynn & Boston Railroad*, 388.

See ACTION, 2-4; ADMISSIONS, 2, 3; DEPOSITION; DOG; EMPLOYERS' LIABILITY ACT; EVIDENCE, 12-20; HIGHWAY, 3-5; HORSE; LANDLORD AND TENANT, 2, 3; MASTER AND SERVANT; NOTICE; PARTIES, 1; PASSENGER; RAILROAD, 2; SEWER; TOWN.

NEGOTIABLE INSTRUMENTS.

See BANK, 2; BILL OF EXCHANGE; PROMISSORY NOTE; TRUST AND TRUSTER, 3.

NEW TRIAL.

Where, on an issue whether an alleged will was procured through the undue influence of the testator's son, no exception is taken to any ruling and no request for instructions is made, and the jury returns a verdict in favor of the will, a motion for a new trial, on the ground that the finding of the jury is against the law and the evidence and the weight of the evidence, is addressed to the discretion of the justice who heard the case, and cannot be revised by this court. *Capper v. Capper*, 262.

See EXCEPTIONS, 23; VERDICT.

NON-JOINDER.

See PARTIES, 1.

NON-USER.

See EASEMENT, 2.

NOTICE.

In an action for personal injuries under the employers' liability act, St. 1887, c. 270, the notice was directed to the "E. M. Street Railway Co.," and stated that the plaintiff was injured by being thrown from the top of one of the cars of that company. It was served upon that company by delivering a copy to its president, who was also president of the defendant company. The first named company had recently been leased to the defendant company. *Held*, that the notice was rightly excluded, and that St. 1894, c. 389, relative to notices in cases of injuries to persons or property, did not apply. *Harding v. Lynn & Boston Railroad*, 415.

See DEPOSITION; EMPLOYERS' LIABILITY ACT, 7; EQUITY, 7;
EVIDENCE, 1; LANDLORD AND TENANT, 1, 3; PASSENGER, 3.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 1; PASSENGER, 3.

ORDINANCE.

See CITY, 3, 5; EVIDENCE, 1; SIDEWALK.

PARENT AND CHILD.

See NEGLIGENCE, 11; TRUST AND TRUSTEE, 2.

PARTIES.

1. The non-joinder of a partner is no defence to an action against his co-partner for personal injuries sustained by an employee of the firm. *Brady v. Norcross*, 331.
2. If a bill in equity is brought by a married woman to redeem land which had been conveyed to her by her husband from a mortgage given by them to one of the defendants and assigned to the other, and a master's report finds that nothing is due on the mortgage to either defendant, but that a third person has an equitable claim under it as security for an amount due him from the plaintiff and her husband, and the decree entered thereon directs the plaintiff to pay him such sum, and after such payment the mortgage to be discharged, both the third person and the plaintiff's husband should be made parties to the bill before the case can properly be finally disposed of. *Pierce v. Le Monier*, 508.

See CONTRACT, 1; INSURANCE, 2; PROMISSORY NOTE; SET-OFF.

PARTITION.

See ADVERSE POSSESSION, 2; AMENDMENT; EVIDENCE, 22;
EXCEPTIONS, 16.

PARTNERSHIP.

See CONTRACT, 9; EXCEPTIONS, 9, 10; PARTIES, 1; TAX, 2, 3; TITLE.

PASSENGER.

1. If a passenger upon a street car suffers physical injury from fright caused by the removal of a drunken man, and by a slight unintentional battery of her person, she can recover only for the fright caused by the battery, not for that which was due to her general disturbance. *Spade v. Lynn & Boston Railroad*, 488.
2. It seems that an unavoidable battery of a passenger's person in the process of lawfully removing a drunken man from a street car is not actionable. *Ibid.*
3. A street railway company's obligations to a passenger are not increased by notice that he has unstable nerves. *Ibid.*

See ACTION, 2; NEGLIGENCE, 5-10.

PAYMENT.

See CONTRACT, 1, 3, 4, 6; EVIDENCE, 3; FRAUDS, STATUTE OF, 2;
GUARDIAN AND WARD, 2; PURCHASER IN GOOD FAITH.

PERSONAL PROPERTY.

See EVIDENCE, 4, 10, 11, 21; EXCEPTIONS, 11, 19; TAX, 2, 8; TITLE.

PHOTOGRAPH.

Whether a photograph is properly verified, and also whether it is practically instructive to the jury, are questions to be determined by the presiding justice under the circumstances. *Carey v. Hubbardston*, 108.

PHYSICIAN.

See CITY, 1, 3, 4; EXCEPTIONS, 22.

PLEADING.

See ANSWER; BASTARDY, 1; BOND, 4; CERTIORARI, 1; CONTRACT, 6; DECLARATION; EQUITY, 9; FALSE PRETENCES, 1; NEGLIGENCE, 9; RAILROAD, 2; SALE, 4.

PLEDGE.

See EXCEPTIONS, 18; PURCHASER IN GOOD FAITH.

POLICE COURT.

See FORFEITURE; RECOGNIZANCE.

POLICE POWER.

See CONSTITUTIONAL LAW, 3.

POOR DEBTOR.

1. Either the refraining from surrendering the principal in a poor debtor's recognizance, or the surety's promise to pay the execution on which the principal was arrested, is a consideration for an agreement by the creditor to continue the matter from week to week. *Thomson v. Way*, 423.
2. Where the creditor in a poor debtor's recognizance has agreed to continue the matter from week to week, provided the surety will pay by specified instalments the execution on which the principal was arrested, if at the time when the creditor has the principal defaulted the surety has done all that he was bound to do, it is immaterial that he has not kept his tender good. *Ibid.*

POWER OF ATTORNEY.

See FOREIGN JUDGMENT, 2.

PRACTICE.

See AMENDMENT; APPEAL; AUDITOR; BASTARDY, 1, 3, 4; CERTIORARI; CONTEMPT; DISCHARGE; EQUITY, 3, 8, 9; EVIDENCE, 1, 10; EXCEPTIONS; EXECUTOR; EXPERT; FOREIGN CORPORATION, 1, 2, 5, 6; FOREIGN JUDGMENT; FORFEITURE; GRADE CROSSING, 2; GUARDIAN AND WARD, 1; INSOLVENT DEBTOR; MECHANIC'S LIEN, 1, 5; NEW TRIAL; NOTICE; PARTIES; RECOGNIZANCE; SALE, 4; SENTENCE; SET-OFF; SIDEWALK; TRIAL; VERDICT; WITNESS.

PRECATORY TRUST.

See TRUST AND TRUSTEE, 1.

PRESCRIPTION.

If an obstruction to an unauthorized way is put up before the time of prescription has run, the running of the time will be interrupted, although the obstruction is torn down very soon, and the use of the way resumed. *Brayden v. New York, New Haven, & Hartford Railroad*, 225.

See ADVERSE POSSESSION; AMENDMENT.

PRESUMPTION.

See EMPLOYERS' LIABILITY ACT, 2; HUSBAND AND WIFE, 1;
SPECIFIC PERFORMANCE, 2.

PRINCIPAL AND AGENT.

1. An action on a contract, made by the plaintiff with an alleged agent of the defendant, cannot be maintained without proof that the alleged agent was in fact the agent of the defendant. *Manning v. Carberry*, 432.
2. On the issue whether the defendant authorized an alleged agent to make a certain contract, there was evidence that before the trial the alleged agent made statements in the presence of the defendant and others tending to show that he was authorized to make the contract; but the plaintiff's bill of exceptions did not show whether the defendant remained silent or not. *Held*, that there was no evidence that the defendant assented to the statements of the alleged agent. *Ibid*.
3. In an action to recover the price of bricks used in erecting a building upon land of the defendant, it appeared that the bricks were ordered by the defendant's son in law, and that the defendant, her husband, her daughter, and her son in law lived together on the place where the building was put up. There was evidence that the son in law hired the farm under an oral arrangement, but this was denied by the plaintiff. In April

or May the son in law began building, having conveyed his personal property on the place to the defendant in January, and he went into insolvency in November, soon after the work was finished. The value of the work done was estimated by the plaintiff, an expert, at from ten to twelve thousand dollars. There was evidence that the defendant knew of the work while it was going on, and it was not disputed that some painting on the place was paid for by the defendant's husband, who was her general agent, with her money. *Held*, that, while the defendant introduced evidence tending the other way, the jury would be warranted in finding that the building was ordered by the defendant's authority. *Beston v. Amadon*, 84.

4. If a principal, upon learning of an unauthorized contract of his agent, repudiates it, giving an unfounded reason for so doing, such repudiation is not equivalent to a ratification of the contract, in the absence of anything beyond this to work an estoppel. *Brown v. Henry*, 559.
5. A petition for review of a judgment against a corporation, signed with the name of the corporation by its president, was filed, and the president affixed the signature and seal of the corporation as principal to a supersedeas bond, which was also executed by two sureties. During the period of more than a year that the petition was pending, no suggestion was made that the petition and bond were not the acts of the corporation, and the corporation obtained a stay of the execution under the bond. In an action upon the bond, the corporation, by the same attorney who acted for the sureties, admitted its liability on the bond, and agreed that judgment should be entered against it, but the sureties continued the defence. *Held*, that there was sufficient evidence to support the finding that the corporation ratified the action of its president in executing the bond. *Simmons v. Shaw*, 516.

See BANK; EQUITY, 1, 5, 9; ESTOPPEL, 2; EVIDENCE, 10; EXCEPTIONS, 19; INSOLVENT DEBTOR, 2; INSURANCE, 5; MARRIED WOMAN; PROMISSORY NOTE; TOWN, 1; WAIVER, 2.

PRINCIPAL AND SURETY.

See ANSWER; POOR DEBTOR; SET-OFF.

PROBATE COURT.

See EXECUTOR.

PROMISSORY NOTE.

The indorsement on a promissory note "Estate of Jona. D. Wheeler, Henry F. Wing, Executor," means "estate of Wheeler by Wing," and therefore fails to bind Wing by contract. *Grafton National Bank v. Wigg*, 513.

See ESTOPPEL, 1; FOREIGN JUDGMENT, 2; INSOLVENT DEBTOR, 1.

PUBLIC OFFICER.

See SIDEWALK.

PURCHASER IN GOOD FAITH.

One in good faith receiving money in payment of or as security for an existing debt is not bound to inquire where the money was obtained. *Spaulding v. Kendrick*, 71.

RAILROAD.

1. The D. & M. Railroad Company was chartered by St. 1846, c. 228, to construct a railroad, beginning at or near the depot of the O. C. Railroad at N. Village in D., and thence to some convenient point in D. or M. at or near the Upper Mills. On April 15, 1847, the company filed a written instrument and a plan purporting to be a location conformably to the statute. The written location described a line which it declared was the centre line for a single track, and which "commences at the centre between the track of the O. C. Railroad opposite the southerly corner of N. Depot in D." From this terminus the line was exactly described by definite courses and distances for a length of some 16,085 feet. The other terminus was not fixed otherwise than by the given courses and distances from the place of beginning; but the instrument stated that the described line conformed to the line described in the charter, which required that end of the railroad to be at some convenient point at or near the Upper Mills. The written location, after stating that the line described "is the centre line for a single track," stated further that "the width of line taken varies from two to five rods, according as the embankments or excavations require." A., who owned a track of land through which the railroad was built, brought an action of trespass against B. for removing in 1894 from land by the side of the railroad track a train load of gravel there delivered to him at a place where the railroad bordered on A.'s land. The court ruled that the location constituted a valid location two rods in width and no more, of which the centre line was defined, and found that no act was done by the defendant outside of the railroad location. *Held*, that there was a valid location two rods in width. *Harding v. Biggs*, 590.
2. The declaration in an action against a railroad company contained two counts, the first at common law for personal injuries suffered by the plaintiff's intestate, and the second under Pub. Sts. c. 112, § 212, as amended by later statutes for his death. The judgment in a former action between the same parties was rendered on a declaration under the employer's liability act, St. 1887, c. 270, for personal injuries suffered by the plaintiff's intestate and not for his death. The writ in the second action was dated May 17, 1897, and the plaintiff's intestate died on July 21, 1891, and received the injuries which caused his death on July 20, 1891. By Pub. Sts. c. 112, § 212, the action under that section must be "commenced within one year from the time of the injury causing the death." This defence

was set up in the defendant's answer. *Held*, that, while the judgment in the first case was not a bar to the prosecution of the present action on the second count, the answer that the action was not begun within the year was a good defence thereto. *Clare v. New York & New England Railroad*, 211.

See ACTION, 2; FOREIGN CORPORATION, 1; GRADE CROSSING; MASTER AND SERVANT, 1-3; NEGLIGENCE, 2-10; REPORT.

RAPE.

It cannot be said, as matter of law, that, at the trial of an indictment for rape of a girl fourteen years old, the judge was not justified in admitting evidence that the girl "made complaint to her [mother] the next morning after the occurrence as to what had been done to her by the defendants the night before," if it appears that the alleged rape was between nine and ten o'clock in the evening; that the girl was not out of the defendants' company until half past ten, when she entered a friend's house crying, excited, and frightened; that the friend took her to her home at twelve o'clock, when she was still frightened and trembling, and her mother put her to bed; and that she made the complaint the next morning. *Commonwealth v. Cleary*, 175.

RATIFICATION.

See CONTRACT, 1; ESTOPPEL, 2; PRINCIPAL AND AGENT, 4, 5; WAIVER, 2.

REAL ESTATE.

See ADVERSE POSSESSION; AMENDMENT; DEED, 2; EASEMENT; EQUITY, 1-7; ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 22; EXCEPTIONS, 16; EXPERT; FORCIBLE ENTRY AND DETAINER; GRADE CROSSING, 4; HIGHWAY, 1; HUSBAND AND WIFE; LANDLORD AND TENANT; LEASE; MECHANIC'S LIEN; PRINCIPAL AND AGENT, 3; RAILROAD, 1; SEWER; SPECIFIC PERFORMANCE; STREET RAILWAY.

RECEIVER.

See FOREIGN CORPORATION, 3.

RECOGNIZANCE.

That a police court did not have jurisdiction to impose sentence upon a person arrested and brought before it upon a criminal complaint, and that a recognizance which he entered into for his future appearance at that court contained the words "sentence," "final sentence," and "term," do not render the recognizance void, but those words may be rejected as surplusage, or "term" may be construed to mean time, and "sentence"

to mean order; and the recognizance cannot be construed so as to require his appearance before the Superior Court. *Reed v. Police Court of Lowell*, 427.

See FORFEITURE; POOR DEBTOR.

RECORD.

See APPEAL, 2, 4; CERTIORARI; EXCEPTIONS, 11; MECHANIC'S LIEN, 3.

REDEMPTION.

See EQUITY, 7; MORTGAGE, 2; PARTIES, 2.

RELEASE.

See EQUITY, 7.

REMAINDER.

See EQUITY, 7; ESTATES OF PERSONS DECEASED, 2.

REPLEVIN.

See EVIDENCE, 4.

REPORT.

The objection, that the Commonwealth filed no exceptions, but only objections, to the report of an auditor appointed under St. 1890, c. 428, § 7, upon the allowance of expenses incurred in the abolition of a grade crossing, if not taken in the Superior Court, is not open in this court upon a report of the case. *Newton, petitioner*, 5.

See APPEAL, 4; AUDITOR; GRADE CROSSING, 2; GUARDIAN AND WARD, 1; SUPREME JUDICIAL COURT.

RESCISSION.

See CONTRACT, VI.; EQUITY, 1.

RESERVATION.

See EASEMENT, 3-5.

RESIDENCE.

See BASTARDY, 2.

RESULTING TRUST.

See TRUST AND TRUSTEE, 2.

REVIEW.

See PRINCIPAL AND AGENT, 5.

ROAD COMMISSIONERS.

See HIGHWAY, 2.

SALE.

1. When an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete. *Edgar v. Joseph Breck & Sons Corp.* 581.
2. If an oral contract is made for the sale of goods to be delivered in the future, it is immaterial that at that time it was not evidenced by a memorandum in writing, but the statute of frauds can be satisfied later as effectually as at the time, and is satisfied by delivery of the goods. *Ibid.*
3. The statement on a printed bill-head, sent with seeds alleged to have been sold previously with a warranty, that the seller does not warrant seeds can have no effect unless it leads to the inference that the old contract has been rescinded and a new one substituted by mutual agreement, but whether it is evidence of a rescission or not, it does not establish one, as matter of law, and does not exclude proof of warranty. *Ibid.*
4. By declaring in set-off for the price of the goods after notice of an alleged warranty by the declaration in an action for breach of the warranty, the defendant affirms the sale, whatever it turns out to be, and must take it with its burden. *Ibid.*

See ADVERSE POSSESSION, 1; BANK; DAMAGES, 8, 4; DECEIT; EQUITY, 1-6; ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 21; EXCEPTIONS, 14; FALSE REPRESENTATIONS; FRAUDS, STATUTE OF, 1; INJUNCTION.

SEAL.

See CONTRACT, 3.

SENTENCE.

The general rule is that, where the court has jurisdiction and errs merely in regard to the punishment, relief will not be granted by habeas corpus, but the remedy is by a writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed; although in exceptional cases relief may be granted by habeas corpus or questions of constitutionality considered. *Bishop, petitioner*, 35.

See CONSTITUTIONAL LAW, 1; RECOGNIZANCE.

SET-OFF.

In an action against the principal and sureties on a bond, a judgment against the present plaintiff in another action, which has been assigned to the sureties only, cannot, under Pub. Sts. c. 168, § 8, be set off; and the contention that the present action must be treated as one against the sureties alone cannot be maintained, if, although the principal had not been served with process or entered his appearance when the declaration in set-off was filed, he appeared subsequently. *Simmons v. Shaw*, 516.

See CONTRACT, 6; EVIDENCE, 3; GUARDIAN AND WARD, 2; SALE, 4.

SEWER.

1. A city, in discontinuing a sewer upon building a new one, is bound to proceed with due regard to the fact that the premises of a person are connected with and drain into the old sewer, and if it fails to do so it is liable for the damages resulting to him therefrom, unless there was contributory negligence on his part. *O'Brien v. Worcester*, 348.
2. Whether the owner and occupant of premises connected with a sewer in a city knew or ought to have known that a new sewer was being constructed in the street, and was negligent in not connecting his premises with it, are questions of fact for the jury, in an action against the city for damages caused by walling up the old sewer. *Ibid.*
3. If a person whose premises in a city are connected with a public sewer knew, or by the exercise of reasonable care ought to have known, that a new sewer was being built and that the old sewer was walled up, and negligently omitted to connect his premises with the new sewer, or failed to take such measures of prevention or precaution as ordinary prudence would have required, he cannot recover against the city for any damages to which such negligence contributed. *Ibid.*
4. Where a sewer in a city is discontinued and a new one built, if the city walls up the old sewer, causing the water and sewage to set back upon premises connected with it, the owner is entitled to recover for the injury to his estate, including loss of rents and reasonable compensation for his trouble and expense in respect to his property, unless and except to the extent to which by reasonable care and precaution he could have guarded against such injury; but he cannot recover the expense of connecting his premises with the new sewer. *Ibid.*
5. In a joint action by the owners of an estate against a city for injuries caused, upon building a new sewer, by the walling up of an old one with which the estate was connected, they cannot recover for injuries to their health. *Ibid.*

See CERTIORARI; CONSTITUTIONAL LAW, 2; EMPLOYERS' LIABILITY ACT, 8, 9.

SHADE TREE.

See HIGHWAY, 2.

SIDEWALK.

It is no defence to a complaint for storing furniture on a sidewalk, in violation of a city ordinance which provides that no person shall place upon any sidewalk certain articles "so as to obstruct a free passage for travellers for more than fifteen minutes," that the defendant acted as a public officer in obedience to a writ of execution ordering him to cause a person to have possession of the tenement from which the furniture was removed. *Commonwealth v. Lennon*, 434.

See NEGLIGENCE, 1.

SLANDER.

See DECLARATION; EXCEPTIONS, 22.

SPECIFIC PERFORMANCE.

1. If an agreement is made for the conveyance of land by a good and clear title free from all encumbrances, it is immaterial how the title has devolved in the past, if the deed tendered is sufficient to convey the full fee in the whole land free from encumbrances and from such clouds as in equity bar a decree for specific performance. *Chauncey v. Leominster*, 340.
2. Where the title to a portion of land agreed to be conveyed by a good and clear title free from all encumbrances descends from a deceased person upon whose estate administration has not been taken out, and sufficient time has not elapsed to raise a presumption that administration will not yet be granted, this court will not decree specific performance of the agreement; and the mere failure of the defendant to produce evidence that there are debts against the estate is not enough to show that the risk is so small that he should be compelled to assume it. *Ibid.*

STATE.

See GRADE CROSSING, 3; HIGHWAY, 1.

STATUTE.

Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. *Sheldon v. Boston & Albany Railroad*, 180.

See ADVERSE POSSESSION, 1; BANKRUPTCY; BASTARDY, 1; BENEFICIARY ASSOCIATION, 1; BOND, 2; CERTIORARI, 2; CITY, 1-3; CONSTITUTIONAL LAW; CONTRACT, 4, 6; COVENANT; CRUELTY TO ANIMALS; DISCHARGE; DOG; EASEMENT, 5; EMPLOYERS' LIABILITY ACT; EQUITY, 3, 7; ESTATES OF PERSONS DECEASED, 1; EVIDENCE, 12; FALSE PRETENCES, 1, 5; FORCIBLE ENTRY AND DETAINER; FOR-

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See FRAUDS, STATUTE OF.

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STREET.

See HIGHWAY.

STREET RAILWAY.

Section 4 of Pub. Sta. c. 109, relative to assessing damages of the owners of land near highways along which lines are constructed by companies for the transmission of intelligence by electricity, as amended by St. 1884, c. 306, which extends its provisions in certain cases to “electric light and electric power lines,” is not applicable to ordinary street railways which use electricity as a motive power. *McDermott v. Warren, Brookfield, & Spencer Street Railway*, 197.

See ACTION, 3; EMPLOYERS' LIABILITY ACT, 6; EVIDENCE, 17;
NEGLIGENCE, 12-14; NOTICE; PASSENGER; TOWN, 1.

SUPERIOR COURT.

See AMENDMENT; APPEAL; CONSTITUTIONAL LAW, 1; GRADE CROSSING, 3;
RECOGNIZANCE; REPORT; SUPREME JUDICIAL COURT; TAX, 1.

SUPREME JUDICIAL COURT.

It is too late to raise in this court the point, not taken in the Superior Court, that a town has no standing here because it did not file in the Superior Court objections to a report in accordance with Equity Rules XXXI. and XXXII. of that court. *Providence & Worcester Railroad, petitioner*, 117.

See APPEAL, 2-5; EQUITY, 8; EXCEPTIONS, 20; GRADE CROSSING, 2;
NEW TRIAL; REPORT; SPECIFIC PERFORMANCE, 2.

SURPLUSAGE.

See RECOGNIZANCE.

SURETY.

See POOR DEBTOR; SET-OFF.

TAX.

1. Where the paramount object of a corporation, organized under Pub. Sts. c. 115, is the dissemination of theosophical ideas, and the procuring of converts thereto, and everything else is subordinate, on an appeal to the Superior Court from the decision of the board of assessors, under St. 1890, c. 127, refusing an abatement of the petitioner's taxes, the finding of the judge that the petitioner is not a literary, benevolent, charitable, or scientific institution within the meaning of the Pub. Sts. c. 11, § 5, cl. 3, as amended by the St. of 1889, c. 465, will not be disturbed. *New England Theosophical Corp. v. Boston*, 60.
2. The fact that boards sawed by partners in D., where they own a permanent sawmill, dam, and mill privilege, are box boards, and are mainly used by them in the manufacture of boxes at their box factory in H., does not change the principle that they have a place of business in D.; and the personal property employed in that business is rightly taxed to the partnership in D. under Pub. Sts. c. 11, § 24. *Duxbury v. County Commissioners*, 383.
3. In an action to recover the amount of a tax paid under protest, it appeared that the plaintiffs with one M. lived in the defendant city but carried on no business there, that they were copartners having a factory in N. in another State, and that the tax in question was assessed on account of their partnership property there situated. The judge was warranted in finding that B. in this Commonwealth was the place of business of the firm. *Held*, that, under Pub. Sts. c. 11, § 24, the property was taxable in B., and that the action could be maintained. *Spinney v. Lynn*, 464.

See ADVERSE POSSESSION, 1; EQUITY, 7; TITLE.

TENANT AT WILL.

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT, 1.

TENANTS IN COMMON.

1. The conveyance by a tenant in common of a part of the estate by metes and bounds is not absolutely void, but is good by way of estoppel against the grantor and his heirs, and is valid against all persons unless avoided by the cotenants. *Frost v. Curtis*, 401.

2. If the grantor of land is a disseisor at the time of the delivery of the deed, he is none the less such because in fact the title but for the disseisin is in him and another as tenants in common. *Frost v. Curtis*, 401.

See ADVERSE POSSESSION, 2.

TENDER.

See POOR DEBTOR, 2; SPECIFIC PERFORMANCE, 1.

THREATS.

See DECLARATION.

TITLE.

Upon the facts of this case, which was an action to recover the amount of a tax assessed to a firm upon a stock of goods, and demanded of and paid by the plaintiff under protest, the judge, sitting without a jury, was warranted in finding that the plaintiff was the owner of the goods assessed, or had such an interest in them as to be liable for the tax. *Raymond v. Worcester*, 205.

See DEED, 2; SPECIFIC PERFORMANCE.

TORTS.

See ACTION, 2-4; ADMISSIONS, 2, 3; ASSAULT AND BATTERY; DECLARATION; DOG; EMPLOYERS' LIABILITY ACT; EVIDENCE, 12-21; EXCEPTIONS, 18, 19, 22; HIGHWAY, 2-5; LANDLORD AND TENANT, 2, 3; MARRIED WOMAN; MASTER AND SERVANT; NEGLIGENCE; PASSENGER; RAILROAD; SEWER.

TOWN.

1. If a town does the work of macadamizing a street, which it is the duty of a street railway company to do, under an arrangement with the company by which the latter is to pay for the work, and also sells a small amount of the crushed stone to private persons, in an action against the town for causing the death of A. while employed by the town in the work, the jury are warranted in finding that the town did the work voluntarily as a private enterprise and not under statutory compulsion, and that the superintendent of streets, who had charge of the work, was acting as the agent of the town; and it is immaterial whether the undertaking proved profitable, and evidence on that point is properly excluded. *Collins v. Greenfield*, 78.
2. If a town, from private motives, undertakes a work which actually it might have left to be done by another, and employs A. to aid it in that work, it will be liable for A.'s death caused by the negligence of its superintendent. *Ibid.*

See CITY; CONSTITUTIONAL LAW, 3, 4; EMPLOYERS' LIABILITY ACT, 7, 8; GRADE CROSSING, 3; HIGHWAY, 2, 4, 5; SUPREME JUDICIAL COURT.

TRAVELLER.

See HIGHWAY, 2-5; NEGLIGENCE, 2-4, 11-14; SIDEWALK.

TRESPASS.

See ASSAULT AND BATTERY; INJUNCTION.

TRIAL.

1. If one party to an action wishes to rely, as showing an admission by the other party, upon testimony referred to by the judge in his charge and used for another purpose, he should call the attention of the judge to it. *Pomeroy v. Boston & Maine Railroad*, 92.
 2. If the defendant testifies in denial of the issue in the case, the fact that the jury may not believe him does not make his testimony affirmative evidence in support of the plaintiff's claim. *Manning v. Carberry*, 432.
 3. It is within the discretion of the judge presiding at a trial, when the plaintiff has rested, to entertain a motion by the defendant to direct the jury to return a verdict for him. *Riley v. Lally*, 244.
 4. The credibility of witnesses and the weight of evidence are for the jury. *Brown v. Greenfield Life Association*, 498.
 5. At the trial of an action for personal injuries alleged to have been received from a defect in a highway, in answer to a question by the judge as to the ground on which the jury found their verdict, the foreman replied that it was on the ground that the plaintiff was not in the exercise of due care. The circumstances under which the question was put were not fully disclosed, and it was stated in the plaintiff's brief that the jury had been out twenty-five hours, but that did not appear in the exceptions. *Held*, that, even if it did appear, it would not render the question improper, nor would the foreman necessarily be unable to state the ground of the verdict. *Edwards v. Worcester*, 104.
- See APPEAL, 4; AUDITOR; CONTEMPT, 1-3; EVIDENCE, 10, 14, 15; EXCEPTIONS, 2-8, 19-21, 23; EXPERT; MECHANIC'S LIEN, 1, 5; NEW TRIAL; PHOTOGRAPH; WITNESS.

TRUST AND TRUSTEE.

1. A testator gave his entire estate, both real and personal, to his wife absolutely. After one or two intervening clauses he provided as follows: "I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives." When the will was made and at the death of the wife, who survived him, they had five children, A. and B., sons, and C., D., and E., daughters. The

wife gave by will, after a few small legacies including a pecuniary legacy to A. and one to B. of an equal amount in trust, her entire estate to C., D., and E. *Held*, on a bill in equity by B. to establish a trust under the will of his father, that, taking the will as a whole, it was not the intention of the testator to create a trust. *Aldrich v. Aldrich*, 101.

2. Where, on a bill in equity for a conveyance, it appears that the plaintiff, who was a widow, did not intend, when the deed was taken in the name of her children, to make a gift or advancement to them, but intended that the beneficiary interest should be exclusively hers, she having paid the purchase money, and was very much surprised when told that the effect of what she had done might be to the contrary, the deed must be regarded as not intended as a gift or advancement, and there is a resulting trust in her favor. *Cooley v. Cooley*, 476.
3. A bill in equity by a steamship company against the executors of A.'s will alleged that A. was the plaintiff's agent in forwarding merchandise brought to a port by its steamboats, and in collecting freight on its behalf from the consignees; that he had collected freight money to a certain amount, which he had neglected to turn over, but sent his check for the amount to the plaintiff with the request that it be held until the deposit to his credit in the bank would be sufficient to meet it; that he died two days afterwards, before the check was made good; but immediately thereafter his former clerk deposited money to the exact amount and for the specific purpose of paying the check; that the check was then presented to the bank, but payment was refused; that the bank, although notified that the money belonged to the plaintiff, paid it to the defendant as executor; and that a demand was made by the plaintiff on the defendant, who refused to pay the same to the plaintiff. *Held*, upon an appeal from a decree declaring, in accord with prayers in the bill, that the money was held by the defendant as trustee for the plaintiff's benefit, and ordering the defendant to pay the same to the plaintiff, with interest and costs, there being no report of the evidence, that the decree was warranted. *Portland Steamship Co. v. Dana*, 447.

See BOND, 2; DEED, 2.

TRUSTEE PROCESS.

At the time of the service of a writ the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about taking possession of the property. No creditors had become parties to the deed. *Held*, that, the title having passed as between the parties to the deed, and the trustee having the right to the immediate possession, the property was "intrusted in the hands" of the trustee within the meaning of Pub. Sta. c. 183, § 21. *Avery v. Monroe*, 132.

See APPEAL, 5.

UNDUE INFLUENCE.

See NEW TRIAL.

USE AND OCCUPATION.

A married woman, in an action against her for use and occupation of a tenement, has no ground of exception to a refusal to rule that the tenancy created by a prior agreement between the plaintiff and the defendant's husband must terminate and cease, either by an eviction or by the husband's vacating the premises, and that if he was not evicted and did not vacate he was in possession, and the plaintiff could not recover. *Twichell v. McNabb*, 329.

USES.

See DEED, 2.

VARIANCE.

Where, in an indictment under Pub. Sts. c. 203, § 2, the averment is of a burning of a "barn of the property of one S. then and there situate and being within the curtilage of the dwelling-house of him, the said S., there also situate," and the proof is that the barn was the property of S. situated within the curtilage of a dwelling-house owned by him, but in which he had never dwelt, and which at the time of the burning was occupied by his tenant, who dwelt with his family in the house and occupied the barn and the curtilage, there is no variance between the allegation and the proof. *Commonwealth v. Elder*, 187.

See APPEAL, 4; EXCEPTIONS, 6; FOREIGN JUDGMENT, 1; NEGLIGENCE, 9.

VERDICT.

It cannot be said that verdicts rendered under erroneous instructions shall stand, when it appears that any defence will be open on a new trial. *Brown v. Greenfield Life Association*, 498.

See ACTION, 1; AMENDMENT; EVICTION; EXCEPTIONS, 10, 12, 23; FALSE PRETENCES, 7; HORSE; LANDLORD AND TENANT, 2; NEGLIGENCE, 12; NEW TRIAL; TRIAL, 3, 5.

VESTED INTERESTS.

See ESTATES OF PERSONS DECEASED, 2.

VOTE.

See EVIDENCE, 7, 8.

WAGES.

See CONTRACT, 4, 6.

WAIVER.

1. The willingness, expressed by a life insurance company in a letter written by its secretary, to consider whether upon investigation it would waive any right to a requirement of a policy that "no suit should be brought" under it "after six months from the date of death of the insured," falls far short of a waiver; and this applies to the subsequent investigation. *Carlson v. Metropolitan Life Ins. Co.* 142.
2. There is no waiver of the requirement of a policy of life insurance that "no suit shall be brought" under it "after six months from the date of death of the insured" by an agent who, by the express terms of the contract, has not the power to vary its terms or to waive forfeitures, there being no evidence that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions, that the insured was justified in believing that he had such authority. *Ibid.*

See INSURANCE, 5; PRINCIPAL AND AGENT, 4.

WARRANTY.

See DAMAGES, 3; EQUITY, 1; EXCEPTIONS, 14; SALE, 1, 3, 4.

WATER AND WATERCOURSE.

See EASEMENT; GRADE CROSSING, 4; SEWER.

WAY.

See CONSTITUTIONAL LAW, 2; HIGHWAY; PRESCRIPTION.

WELL.

See GRADE CROSSING, 4.

WIDOW.

See EQUITY, 6; TRUST AND TRUSTEE, 2.

WILL.

See DEVISE AND LEGACY; NEW TRIAL; TRUST AND TRUSTEE, 1.

WITNESS.

Evidence put in under the Pub. Sta. c. 169, § 22, to contradict a party's own witness, by showing that he has made at other times statements inconsistent with his testimony at the trial, has only the effect of discrediting the witness, and has not the effect of independent evidence. *Manning v. Carberry*, 432.

See EXCEPTIONS, 23; EXPERT; TRIAL, 4.

WORCESTER.

See CITY, 5.

WORDS.

"Able to turn it out, to be disposed of on execution." See *Avery v. Monroe*, 132, 133.

"According as the embankments or excavations require." See *Harding v. Biggs*, 590, 592, 593.

"Actual cost." See *Newton, petitioner*, 5, 10.

"Any attorney of any court of record." See *Van Norman v. Gordon*, 576, 580.

"Assessment Plan." See *Nugent v. Greenfield Life Association*, 278, 285.

"As signed by the applicant." See *Nugent v. Greenfield Life Association*, 278, 284.

"Before letters of administration with the will annexed have been granted, the court may grant letters testamentary." See *Jewett v. Turner*, 496, 497.

"Be forever thereafter discharged and exempt from arrest or imprisonment in any suit, or upon any proceeding for or on account of a debt or demand provable against his estate." See *Keough v. Grime*, 519, 520.

"Benevolent." See *New England Theosophical Corp. v. Boston*, 60, 62.

"Charitable." See *New England Theosophical Corp. v. Boston*, 60, 63.

"Clerk." See *Mack v. New York, New Haven, & Hartford Railroad*, 185, 186.

"Commenced within one year from the injury causing the death." See *Clark v. New York & New England Railroad*, 211, 212.

"Compensation." See *Newton, petitioner*, 5, 11.

"Confined in a prison or other place of confinement." See *Murphy v. Commonwealth*, 264, 272.

"Containing — square feet." See *Keene v. Demelman*, 17, 22.

"Correct copy." See *Nugent v. Greenfield Life Association*, 278, 282.

"Cost." See *Newton, petitioner*, 5, 10.

"Cost of application before the county commissioners." See *Providence & Worcester Railroad, petitioner*, 117, 121.

"Cost of hearing." See *Providence & Worcester Railroad, petitioner*, 117, 119, 121.

"Cruel." See *Commonwealth v. Magoon*, 214, 215.

- "Dividends." See *Daley v. People's Building, Loan, & Savings Association*, 533, 536.
- "Domesticated." See *Bergner & Engel Brewing Co. v. Dreyfus*, 154, 157.
- "Education." See *New England Theosophical Corp. v. Boston*, 60, 63, 64.
- "Electric light and electric power lines." See *McDermott v. Warren, Brookfield, & Spencer Street Railway*, 197, 198.
- "Entitled to receive . . . the par value of the shares named, . . . and no more." See *Daley v. People's Building, Loan, & Savings Association*, 533, 535.
- "Estate of ———, ——— Executor." See *Grafton National Bank v. Wing*, 513, 515.
- "Expense incurred by the town." See *Providence & Worcester Railroad, petitioner*, 117, 118, 119.
- "Ex post facto." See *Murphy v. Commonwealth*, 264, 268.
- "Final sentence." See *Reed v. Police Court of Lowell*, 427, 431.
- "Forming the nucleus of a Universal Brotherhood of Humanity." See *New England Theosophical Corp. v. Boston*, 60, 63.
- "Go into full force and effect upon its passage." See *Parmenter Manuf. Co. v. Hamilton*, 178, 179.
- "Gross negligence." See *Phelps v. New England Railroad*, 98, 100.
- "Heirs by blood." See *Hayden v. Barrett*, 472, 474, 476.
- "I am confident she will manage with good discretion and fidelity what is committed to her, and that . . . it will be equally divided among all our children, or their representatives." See *Aldrich v. Aldrich*, 101, 103.
- "Insolvency of debtors." See *Hogg v. American Credit Indemnity Co.* 127, 128.
- "Intrusted . . . in the hands." See *Avery v. Monroe*, 132, 133.
- "Keeper." See *Boylan v. Everett*, 453, 457.
- "Leaving at all times a sufficient and convenient watering place of fresh water for cattle and other stock." See *Blood v. Millard*, 65, 71.
- "Life of the building." See *Ainsworth v. Mount Moriah Lodge*, 257, 260.
- "Literary, benevolent, charitable," or "scientific institution." See *New England Theosophical Corp. v. Boston*, 60, 62, 63.
- "Lot of land." See *Orr v. Fuller*, 597, 600.
- "Meaning hereby to convey." See *Smith v. Jagoe*, 538, 539.
- "Necessary charges." See *Waters v. Bonvouloir*, 286, 288.
- "No suit shall be brought" (under an insurance policy) "after six months from the date of death of the insured." See *Carlson v. Metropolitan Life Ins. Co.* 142.
- "Of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association." See *Daley v. People's Building, Loan, & Savings Association*, 533, 535.
- "Of New York, N. Y." See *United States National Bank v. Venner*, 449, 452.
- "Other public purposes." See *Waters v. Bonvouloir*, 286, 288.
- "Overruled both pleas." See *Davis v. Carpenter*, 167, 173.
- "Payable in the manner and upon the conditions set forth in the articles of

- association and by-laws and terms and conditions printed on the back of this certificate." See *Daley v. People's Building, Loan, & Savings Association*, 533, 535.
- "Pay weekly each employee," etc. See *Gallagher v. Hathaway Manuf. Co.* 230, 232.
- "Person (The) to whom a policy of life insurance, hereafter issued, is made payable, may maintain an action thereon in his own name." See *Brown v. Greenfield Life Association*, 498, 500.
- "Place of business." See *Duxbury v. County Commissioners*, 383; *Spinney v. Lynn*, 464, 465.
- "Real cost." See *Newton, petitioner*, 5, 11.
- "Reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole." See *Orr v. Fuller*, 597, 601.
- "Resident." See *Bergner & Engel Brewing Co. v. Dreyfus*, 154, 157; *Davis v. Carpenter*, 167, 173.
- "Resulting after said date of expiration upon shipments made during the term of this bond." See *Hogg v. American Credit Indemnity Co.* 127, 129.
- "Scientific." See *New England Theosophical Corp. v. Boston*, 60, 63.
- "Sentence." See *Reed v. Police Court of Lowell*, 427, 431.
- "Shall not prove the debt or claim on account of which the preference was made or given." See *Smith v. American Linen Co.* 227, 229.
- "Superintendence." See *Trimble v. Whitin Machine Works*, 150, 153; *Meehan v. Speirs Manuf. Co.* 375, 377; *McCoy v. Westborough*, 504, 507; *Whelton v. West End Street Railway*, 555.
- "Suspended business for more than one year." See *Stebbins v. Scott*, 356, 360, 362.
- "System (The) of grading their work . . . used by manufacturers." See *Gallagher v. Hathaway Manuf. Co.* 230, 231.
- "Term." See *Reed v. Police Court of Lowell*, 427, 431.
- "Then and there." See *Commonwealth v. O'Brien*, 248, 253.
- "To expire on the 14th day of June, 1897." See *Hogg v. American Credit Indemnity Co.* 127, 128.
- "Total actual cost." See *Newton, petitioner*, 5, 11.
- "Train leaves at 1 p. m. Sunday." See *Goddard v. Morrissey*, 594, 596.
- "Ways, works, or machinery." See *Trimble v. Whitin Machine Works*, 150, 153.
- "Whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be cancelled." See *Daley v. People's Building, Loan, & Savings Association*, 533, 535.
- "Width of line taken varies from two to five rods." See *Harding v. Biggs*, 590, 592.
- "Within the curtilage of the dwelling-house of her, the said ———." See *Commonwealth v. Elder*, 187, 188.

WRIT OF CERTIORARI.

See CERTIORARI.

WRIT OF ENTRY.

See EQUITY, 3.

WRIT OF ERROR.

See CONSTITUTIONAL LAW, 1; SENTENCE.

WRITTEN INSTRUMENTS.

See ADMISSIONS, 1; BILL OF EXCHANGE; BOND; CONTRACT, 7, 8; DEED; EASEMENT; EQUITY, 1-6; EVIDENCE, 2-5, 8, 9; FALSE PRETENCES, 1, 2; FALSE REPRESENTATIONS, 1-3; FORCIBLE ENTRY AND DETAINER, 2; INSURANCE; LEASE; PROMISSORY NOTE; SALE, 2; TRUST AND TRUSTEE, 1, 2; WAIVER.

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